No. 17-1702	
Title:	**Manhattan Community Access Corporation, et al., Petitioners** v. **DeeDee Halleck, et al.**
Docketed:	June 25, 2018
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Numbers:	(16-4155)
Decision Date:	February 9, 2018
Rehearing Denied:	March 23, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 21 2018	Petition for a writ of certiorari filed. (Response due July 25, 2018) **Petition** **Proof of Service** **Certificate of Word Count**
Jul 18 2018	Motion to extend the time to file a response from July 25, 2018 to August 24, 2018, submitted to The Clerk. **Main Document**
Jul 18 2018	Motion to extend the time to file a response is granted and the time is extended to and including August 24, 2018.
Jul 20 2018	Blanket Consent received from counsel for Petitioners, Manhattan Community Access Corporation, et al. filed. **Blanket Consent**
Jul 25 2018	Brief amicus curiae of The Cato Institute filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jul 25 2018	Motion for leave to file amicus brief filed by Chicago Access Corporation. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 22 2018	Brief of respondents Deedee Halleck, et al. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 04 2018	Reply of petitioners Manhattan Community Access Corporation, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	DISTRIBUTED for Conference of 9/24/2018.

Oct 01 2018	DISTRIBUTED for Conference of 10/5/2018.
Oct 09 2018	DISTRIBUTED for Conference of 10/12/2018.
Oct 12 2018	Motion for leave to file amicus brief filed by Chicago Access Corporation GRANTED.
Oct 12 2018	Petition GRANTED.
Oct 24 2018	Joint motion of the parties for an extension of time to file the briefs on the merits filed. **Main Document**
Nov 08 2018	Joint supplement to motion for extension of time filed. **Main Document**
Nov 15 2018	Joint motion of the parties to file the brief on the merits is granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 4, 2018. The time to file respondents' brief on the merits is extended to and including January 11, 2019. The reply brief is to be filed in compliance with Rule 25.3.
Dec 04 2018	Brief of petitioners Manhattan Community Access Corporation, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 04 2018	Joint appendix filed. **Main Document** **Proof of Service**
Dec 11 2018	Brief amicus curiae of Chamber of Commerce of the United States of America in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 11 2018	Brief amicus curiae of The Cato Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 11 2018	Brief amicus curiae of Internet Association in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 11 2018	Brief amicus curiae of Chicago Access Corporation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 11 2018	Brief amicus curiae of NCTA – The Internet & Television Association in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 11 2018	Brief amici curiae of Pacific Legal Foundation and TechFreedom filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Dec 11 2018	Brief amicus curiae of Electronic Frontier Foundation in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 21 2018	SET FOR ARGUMENT on Monday, February 25, 2019.
Jan 11 2019	Record requested from the U.S.C.A. 2nd Circuit.
Jan 11 2019	Brief of respondents DeeDee Halleck, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Jan 14 2019	Record request from the U.S.C.A. 2nd Circuit is electronic.
Jan 15 2019	CIRCULATED
Jan 18 2019	Brief amici curiae of The Alliance for Community Media, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 18 2019	Brief amicus curiae of National Police Accountability Project filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 18 2019	Brief amicus curiae of Knight First Amendment Institute at Columbia University filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 18 2019	Brief amici curiae of New York County Lawyers Association filed. (Distributed) **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Jan 18 2019	Brief amici curiae of THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND NATIONAL COALITION AGAINST CENSORSHIP, filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 11 2019	Reply of petitioners Manhattan Community Access Corporation, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 25 2019	Argued. For petitioners: Michael B. de Leeuw, New York, N. Y. For respondents: Paul W. Hughes, Washington, D. C.

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IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in rejecting this Court's state actor tests and instead creating a *per se* rule that private operators of public access channels are state actors subject to constitutional liability.

2. Whether the Second Circuit erred in holding—contrary to the Sixth and D.C. Circuits—that private entities operating public access television stations are state actors for constitutional purposes where the state has no control over the private entity's board or operations.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners Manhattan Community Access Corporation ("MNN"), Daniel Coughlin, Jeanette Santiago, and Cory Bryce were Defendant-Appellees in the court of appeals in No. 16-4155. Petitioner Manhattan Community Access Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Respondents DeeDee Halleck and Jesus Papoleto Melendez were Plaintiff-Appellants in the court of appeals in No. 16-4155.

The City of New York was a Defendant-Appellee in the court of appeals in No. 16-4155 but is not a petitioner.

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OPINIONS BELOW

The Second Circuit's opinion is reported at 882 F.3d 300 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a. The district court's opinion is reported at 224 F. Supp. 3d 238 and reprinted at Pet. App. 34a.

JURISDICTION

The Second Circuit issued its opinion on February 9, 2018 and denied MNN's petition for rehearing *en banc* on March 23, 2018. MNN timely filed this petition for writ of certiorari on June 21, 2018. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. I, "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT OF THE CASE

This case presents an important—and unsettled—recurring question of law: Under what circumstances can a private entity (here a private operator of a public access channel) be deemed a state actor, subject to claims under the First Amendment? Twenty-two years ago, this Court chose not to address that issue in *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996). Justice Breyer, writing for the plurality, "found it 'unnecessary' and 'unwise' for the Court to 'definitively ... decide whether or how to apply the public forum

doctrine to leased access channels,'" and, by extension, public access channels. Pet. App. 47a-48a (quoting *Denver Area*, 518 U.S. at 749). Justice Thomas concluded in his partial concurrence that privately operated public access channels *are not* public forums, while Justice Kennedy in his partial concurrence argued that public access channels *are* designated public fora—regardless of who operates them.

The decision below perpetuates a deep split within the federal courts and creates a circuit split between the Second Circuit (on one hand) and the Sixth and D.C. Circuits (on the other) on this important issue. But the split goes deeper than the result. The Second Circuit abandoned this Court's state actor analysis and applied a fundamentally flawed new rule—a rule that would sweep nearly all public access operators, and potentially many other private entities, into the "state actor" category. The D.C. and Sixth Circuits, on the other hand, applied this Court's traditional state actor tests and reached the opposite result on similar facts.

Applying this Court's traditional state actor tests: the public function test; the state compulsion test; and the joint action test (as the dissenting judge below and the district court correctly did), leads to the inexorable conclusion that MNN is not a state actor. The same result obtains by applying this Court's test in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), which is appropriate where, as here, a private entity was created pursuant to a governmental designation. The Second Circuit ignored this Court's direction for determining under which rare circumstances private entities would be treated as state actors and applied its own unprecedented test.

A. The Regulatory and Contractual Framework for Public Access

Cable operators must obtain franchises from local governments to lay the cable or optical fibers needed to reach subscribers. Pet. App. 35a. Cable franchise agreements in New York City (the "City") require private cable operators to set aside public access channels, which are then operated by private nonprofit entities. *Id.* at 35a-36a. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (the "1984 Cable Act") prohibits cable operators from exercising editorial control over public access channels. 47 U.S.C. § 531(e).

Similarly, the New York State Public Service Commission's ("PSC") regulations prohibit cable television franchisees and local governments from exercising editorial control over public access channels. 16 N.Y. COMP. CODES R. & REGS tit. 16, § 895.4(c)(8)-(9) (2018). The PSC regulates cable television in New York and hears challenges by, among others, public access producers to ensure that public access channels are operated fairly and comply with state regulations. *See Amano v. City of New York*, 04-V-0321, 2006 WL 4470759 (N.Y.P.S.C. Aug. 30, 2006).

The City awarded cable franchises in Manhattan to Time Warner Entertainment Company, L.P. ("Time Warner"). Pet. App. 36a. Section 8.1.1 of the franchise agreements provides that Time Warner must set aside certain cable channels for public access and that these channels must be operated by an "independent, not-for-profit membership corporation" designated by the Manhattan Borough President. *Id.* at 36a-37a. Nearly

three decades ago, the Manhattan Borough President designated MNN to operate the public access channels set aside in Manhattan. *Id.*

B. Manhattan Neighborhood Network

MNN is a private nonprofit corporation that was incorporated in 1991. *Id.* at 5a, 9a. While the Manhattan Borough President designated MNN as the private nonprofit to operate the public access channel in Manhattan, the Borough President has no control over MNN and can choose only two of the thirteen or more members of MNN's Board of Directors. *Id.* at 37a. The remaining directors are independent. *Id.* MNN owns and has offices (and its main studio) on West 59th Street in Manhattan. MNN also owns and maintains a community facility in East Harlem known as the MNN El Barrio Firehouse Community Media Center. *Id.* MNN receives no funding from the City.

C. Facts Giving Rise To This Action

Respondents are public access producers in Manhattan. *Id.* at 34a. MNN took disciplinary action against Respondents for violating its rules and regulations. Specifically, MNN suspended Mr. Melendez from a leadership program in March 2012 for harassing an MNN employee (and from all MNN services and facilities in 2013 for similar conduct). *Id.* at 38a-40a. Thereafter, Mr. Melendez and Ms. Halleck appeared in and produced a video called "The 1% Visit El Barrio," which included harassing and threatening language directed toward MNN staff during a long diatribe by Mr. Melendez, spoken while standing outside one of MNN's properties:

> Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or ***someone kills them*** so that I can come and have access to the facility here.

Id. at 39a (emphasis added). MNN aired the program on October 2, 2012, but, after receiving complaints from its staff, barred further airings that included the offending language that violated MNN's zero tolerance policy on harassment. *Id.* at 40a. Ms. Halleck was suspended in 2012 for airing the video. *Id.*

Respondents also posted the video on YouTube, where it remains. *See* DeeDee Halleck, *The 1% Visits El Barrio; Whose Community?*, YouTube (July 29, 2012), https://www.youtube.com/watch?v=QEbMTGEQ1xc.

D. Procedural History

On October 15, 2015, Respondents filed a Complaint against Petitioners, the City, and Iris Morales, who was then an MNN employee, alleging violations of 42 U.S.C. § 1983, Article 1 Section 8 of the New York State Constitution, and New York's Open Meetings Law, claiming they were damaged as a result of their respective suspensions. Pet. App. 34a-35a. Respondents later amended their complaint and removed Ms. Morales as a defendant.

1. The District Court Proceedings

On March 18, 2016, Petitioners and the City moved to dismiss the Amended Complaint. The district court

granted the motion in an Opinion and Order dated December 13, 2016. *Id.* at 34a-53a.

The district court dismissed the First Amendment claims against the City, following *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690 (1978). The district court noted that Respondents' "sole allegation against the City [was] the bald assertion that it was 'aware that MNN has censored plaintiffs' and other cable access programming.'" Pet. App. 43a.

The district court also dismissed the First Amendment claims against Petitioners, finding that Respondents had failed to establish that MNN was a state actor subject to constitutional liability under Section 1983. *Id.* at 53a. The court also held that this Court's test in *Lebron* was not satisfied because "among other things, the Manhattan Borough President only has the authority to appoint two of MNN's thirteen board members." *Id.* at 44a.

The district court then discussed this Court's other state actor tests, which the Second Circuit described at length in *Sybalski v. Indep. Grp. Home Living Program Inc.*, 546 F.3d 255, 257 (2d Cir. 2008). Pet. App. 45a. In finding that the "public function" test was not satisfied, Judge Pauley noted that "regulation of free speech in a public forum is 'a traditional and exclusive public function'" and acknowledged that the "public function" test *would be satisfied* if a public access channel was a constitutional public forum like a sidewalk or park. *Id.* at 45a-46a. But the district court determined that a public access channel is not such a public forum.

The district court observed that the circuit courts to have considered the issue (the D.C. and Sixth Circuits) both held that public access channels are not constitutional public forums and district courts have been divided on the issue. The district court also noted that a plurality of this Court in *Denver Area*, 518 U.S. 727, "found it 'unnecessary' and 'unwise' for the Court to 'definitively ... decide whether or how to apply the public forum doctrine to leased access channels,'" and, by extension, public access channels, although Justice Kennedy would have held that public access channels *are* designated public fora and Justice Thomas would have held that *they are not*. Pet. App. 47a-49a (quoting *Denver Area*, 518 U.S. at 749).

In granting MNN's motion to dismiss, the district court acknowledged that "there is no clear precedent governing whether public access channels are public fora," and considered the issue to be "a close call"—but held that public access channels are not constitutional public fora, adopting what it termed "the consensus view of courts within the Second Circuit." *Id.* at 50a-51a (citing *Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552, 558 (E.D.N.Y. 2005); *Glendora v. Tele-Commc'ns, Inc.*, No. 96-cv-4270, 1996 WL 721077, at *3 (S.D.N.Y. Dec. 13, 1996); *Glendora v. Cablevision Sys. Corp.*, 893 F. Supp. 264, 270 (S.D.N.Y. 1995)).

The district court rejected Respondents' argument, based on the Second Circuit's holding in *Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 267 (2d Cir. 1999), that "public access channels are designated public fora because they are 'required by government fiat.'" Pet. App. 52a. The district court held that "MNN is a private entity that operates

television channels, and '[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty.'" *Id.* at 51a (quoting *Glendora*, 893 F. Supp. at 269).

2. Appellate Proceedings

Respondents filed a timely Notice of Appeal to the Second Circuit on December 14, 2016.

On February 9, 2018, the Second Circuit issued a splintered decision, with two Justices (Newman and Lohier, JJ.) affirming the district court's holding as to the City but reversing as to Petitioners.

The majority opinion (Newman, J.) ("Majority") acknowledged that, because MNN is a private entity, "the viability of the Plaintiffs' First Amendment claim against it and its employees depends on whether MNN's actions can be deemed state action." *Id.* at 9a (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)). But instead of applying this Court's state action tests, the Majority simply asked "whether the public access channels ... are public forums." *Id.* at 10a.

Relying on Justice Kennedy's *Denver Area* concurrence, the Majority held that:

> where, as here, federal law authorizes setting aside channels for public access to be 'the electronic marketplace of ideas,' state regulation requires cable operators to provide at least one public access channel, a municipal contract

> requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums.

Id. at 13a-14a. Having concluded that public access channels are public fora, the Majority then noted that, "whether the First Amendment applies to the individuals who have taken the challenged actions in a public forum depends on whether they have a sufficient connection to governmental authority to be deemed state actors." *Id.* at 14a. The Majority summarily concluded that the necessary connection between MNN and the City "is established in this case by the fact that the Manhattan Borough President designated MNN to run the public access channels." *Id.* at 14a-15a.

The Majority then attempted to distinguish its holding from *Loce*, 191 F.3d 256, where the Second Circuit determined that "[t]he fact that federal law requires a cable operator to maintain leased access channels and the fact that the cable franchise is granted by a local government are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as state action." *Id.* at 267. The Majority distinguished *Loce* on the basis that it involved "leased access" as opposed to "public access" channels. Pet. App. 16a.

The Majority acknowledged that the D.C. and Sixth Circuits "have not considered public access channels to be public forums." *Id.* The Majority noted that the *en banc* court in *Alliance for Community Media v. F.C.C.*, 56 F.3d 105, 123 (D.C. Cir. 1995) ("*ACM*"), *reversed in part on*

other grounds sub nom., Denver Area, 518 U.S. at 768, found "no state action ... because that essential element cannot be supplied by treating access channels as public forums." Pet. App. 16a. The Majority also acknowledged its rejection of the Sixth Circuit's holding in *Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir. 2007), that the private operator of a public access channel was not a state actor after applying the traditional state actor tests (and not engaging in public forum analysis). Pet. App. 16a n.8.

Judge Lohier's concurrence added that "in the specific circumstances of this case we might also rely on the public function test" to find state action. *Id.* at 19a. Judge Lohier concluded that MNN exercised the "traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels" because MNN's programming relates to "in a word, democracy." *Id.* at 20a. In reaching this conclusion, Judge Lohier took judicial notice of cherry-picked portions of MNN's website, which were not part of the record below, and concluded that MNN largely offered political-type programming, ignoring the other programming and non-government-related functions MNN provides. *Id.*

The concurrence acknowledged that its "public function" analysis was in direct conflict with the Sixth Circuit's *Wilcher* decision. Whereas *Wilcher* found a public access operator was not performing a public function because "TV service is not a traditional service of local government," the concurrence held that it was inappropriate to look at public access as simply an "entertainment facility." *Id.* at 19a.

In his dissent, Judge Jacobs noted that the "[M]ajority's conclusion that MNN is a state actor opens a split with the Sixth Circuit; considerably worse, it opens a split with the Second Circuit." *Id.* at 33a. Judge Jacobs noted that "[a] private entity may become a state actor *only* under the following limited conditions," and listed this Court's state action tests as described by the Second Circuit in *Sybalski*, 546 F.3d at 257. Pet. App. 23a (emphasis added).

The dissent examined each test and concluded that none were satisfied. The dissent determined that the "compulsion test" was not met because "MNN's designation in a franchise agreement and regulation by a municipal commission do not in and of themselves demonstrate that MNN is 'controlled' or 'compelled' by the state." *Id.* at 23a-24a. Moreover, Respondents made "no allegation of government involvement in the[ir] suspensions from which state action can be inferred." *Id.* at 24a. The dissent found that the "joint action" test was not satisfied because neither "the statutory guidelines for cable access [n]or the borough's oversight activities establish joint action" and because the *Lebron* factors did not mandate a finding of state action. *Id.* at 24a-25a. The "public function" test, according to the dissent, was not satisfied because "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." *Id.* at 25a. The dissent concluded that "it is fortunate for our liberty that it is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment." *Id.* at 26a.

The dissent also noted that "[a] ruling in favor of MNN will be consistent with our precedent in *Loce*." *Id.* at 33a. The dissent would have held that *Loce* controlled and that administering access channels does not constitute state action. "The logic of *Loce*," according to the dissent, "applies with equal force to public-access programming" because "[c]able operators are equally obligated to provide both 'forums': federal law requires them to set aside a portion of their capacity for leased access ... and permits franchising authorities to require (as the relevant one does) a similar set-aside for public access" and, "if anything, the *Loce* analysis applies to public-access channels *a fortiori*." *Id.* at 27a-28a.

By Order dated March 23, 2018, the Second Circuit declined to grant Petitioners' petition for rehearing. *Id.* at 54a-55a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT IGNORED THIS COURT'S STATE ACTION TESTS AND CREATED AN IMPROPER *PER SE* TEST

The Majority held—as a matter of law—that Manhattan's privately owned and operated public access channels are *constitutional* public fora and that the private owner and operator (and its employees) are therefore state actors subject to constitutional liability. In reaching that conclusion, the Majority ignored this Court's tests for determining when private parties can be deemed state actors.

A. This Court's State Actor Tests

This Court has identified as a "great object of the Constitution" the goal of "permit[ting] citizens to structure their private relations as they choose." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). "It is a fundamental fact of our political order" that constitutional liability is only applied to conduct "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-937 (1982); *see also Edmonson*, 500 U.S. at 620 ("conduct of private parties lies beyond the Constitution's scope in most instances" and only where private entities "must be deemed to act with the authority of the government" are such private actors "subject to constitutional constraints"); *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (discussing same) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974)).

Public Function Test. The "public function" test considers whether a private entity is performing a function traditionally and exclusively performed by government. *See Jackson*, 419 U.S. at 352-53; *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). This inquiry, by design, has "carefully confined bound[aries]" because "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158, 163 (1978).

Compulsion and Joint Action Tests. In *Blum*, the Court set out another basis for state action, paving the way for the development of the "compulsion" and "joint action" tests: "when [the state] has exercised coercive power or has provided such significant encouragement, either

overt or covert, that the choice must in law be deemed to be that of the state." 457 U.S. at 1004; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (private insurers not subject to constitutional requirements where the state neither coerced nor encouraged the insurer's actions); *Rendell-Baker*, 457 U.S. at 839-40 (applying *Blum* analysis to determine that private school for special needs students was not state actor, even though it received public funds and was heavily regulated, where challenged employment decision was not coerced or influenced by the state). Even where there is "extensive state regulation of private activity, we have consistently held that '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the [Constitution].'" *Sullivan*, 526 U.S. at 52 (quoting *Jackson*, 419 U.S. at 350); *cf. Lugar*, 457 U.S. at 942 (private party's "invoking the aid of state officials to take advantage of state created attachment procedures" was "joint participation with state officials ... sufficient to characterize that party as a 'state actor'"). Indeed, even when "a private entity performs a function which serves the public[,] [this] does not make its acts state action." *Rendell-Baker*, 457 U.S. at 842.

Most recently, in *Brentwood*, this Court considered whether a private interscholastic athletic association was a state actor. *See* 531 U.S. at 290. A divided Court held that, where the association was comprised mostly of public schools, mostly publicly funded, run by public school officials, and the association's members were eligible for state retirement benefits, the "nominally private character of the Association [w]as overborne by the pervasive entwinement of public institutions and public officials in its compositions and workings," sufficient to

find state action. *Id.* at 298. The majority held: "'[c]oercion' and 'encouragement' are like 'entwinement' in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead." *Id.* at 303. A vigorous dissent by Justice Thomas, joined by Justices Rehnquist, Scalia, and Kennedy, argued that the association was not a state actor "as a matter of common sense or under any of this Court's existing theories of state action, [and] the majority presents a new theory." *Id.* at 312.

This Court followed a different approach in *Lebron*, when it considered whether Amtrak was a state actor when it selected content for public displays in New York's Penn Station. *See* 513 U.S. at 401. Justice Scalia's majority opinion noted it was "unnecessary to traverse that difficult terrain [of deciding when private action might be deemed that of the state]" because Amtrak, which was created by a federal statute and whose board was entirely government-appointed, was "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 513 U.S. at 378, 394. The *Lebron* Court held that, "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 399.

B. The Decision Below Ignored This Court's Tests

The Majority chose not to apply any of this Court's state actor tests—the public function test, the compulsion test, or the joint action test—in concluding that MNN is a

state actor.[1] Nor did the Majority mention in its analysis (much less apply) this Court's *Lebron* test, applicable where a private entity is created by government.[2]

The dissent, on the other hand, examined each of this Court's tests and correctly determined that MNN was not a state actor. The dissent found no allegations that "MNN is 'controlled' or 'compelled' by the state" sufficient to satisfy the "compulsion" test.[3] *Id.* at 23a-24a. Nor, according to the dissent, is the fact that the Borough President designated MNN to run Manhattan's public access channels—*twenty seven years ago*—sufficient, by itself, to satisfy the "joint action" test, which requires a

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1. All of this Court's state actor tests had previously been applied by the Second Circuit. *See Sybalski*, 546 F.3d at 257-59.

2. Had the Majority considered *Lebron*, it would have had to conclude, as the district court did, that the *Lebron* test was not satisfied "because, among other things, the Manhattan Borough President only has the authority to appoint two of MNN's thirteen board members." Pet. App. at 44a. This point is critical because the Majority—in searching for a "sufficient connection to governmental authority"—relied *solely* on the fact that the Manhattan Borough President, in 1991, *designated* MNN to run Manhattan's public access channels. *Id.* at 14a-15a. Based on this fact, which is commonplace for public access channels nationwide, the Majority concluded that MNN and its employees are state actors. But, under *Lebron*, this fact should have been the beginning of the inquiry, not the end of it. And the court would have had to conclude that MNN is not a state actor because there were no allegations of any governmental control of MNN or its board.

3. Moreover, any inference of "compulsion" should have been dispelled when the Second Circuit affirmed the dismissal of the City of New York. Indeed, the only plausible allegations were that MNN acted alone.

showing that there is a "close nexus between the State and the *challenged action*." *Blum*, 457 U.S. at 1004 (emphasis added and citation omitted). The dissent also concluded that MNN did not meet the public function test because it was not performing a function *traditionally* and *exclusively* performed by government.

While the Majority ignored the public function test, Judge Lohier in his concurrence offered that the court "might also rely on the 'public function' test." Pet. App. 19a. Judge Lohier reviewed MNN's website (which was not in the record) and concluded that MNN was performing a traditional and exclusive government function because:

> [its] programming relates to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy.

Id. at 20a.

But this analysis is deeply flawed. Certainly the quad of a private college looks and feels like "democracy" with people of all shapes and sizes, creeds, races, and political views expressing opinions, but that does not transform it into a *constitutional* public forum. Indeed, Judge Lohier's application of the public function test is a radical departure from how the "public function" test is traditionally applied, which requires a "stiff" analysis, with "carefully confined bound[aries]," as to whether the private actor is engaging in a specific function (here, operating a public access channel) belonging traditionally *and* exclusively to government. *Flagg Bros.*, 436 U.S. at 163; *see also Wilcher*, 498 F.3d at 519.

C. The Second Circuit Created an Improper *Per Se* Rule

Instead of applying this Court's state actor tests, the Majority, relying on dicta in Justice Kennedy's *Denver Area* concurrence, created what is essentially a *per se* rule: public access channels are always public fora and, therefore, their private operators are state actors subject to constitutional liability.

This Court has repeatedly cautioned that the state action analysis is a "necessarily fact-bound inquiry." *Brentwood*, 531 U.S. at 298; *see also Edmonson*, 500 U.S. at 621 (state action analysis "is often a factbound inquiry"); *Lugar*, 457 U.S. at 939 (application of state action tests is a "necessarily fact-bound inquiry that confronts the Court"); *Blum*, 457 U.S. at 1004 ("the factual setting of each case will be significant" in performing the state action analysis).

In *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), this Court cautioned against *per se* tests for state action:

> Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the [Constitution]'s embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present.

Id. at 725-26 (citation omitted); *see also id* at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

The Majority here attempted to avoid running afoul of this proscription by claiming that it was limiting its holding to just the facts alleged in this case and stating that it was not "determining whether a public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square." Pet. App. 13a. But the Majority's reasoning squarely contradicts that aspiration.

The Majority held:

> where, as here, federal law authorizes setting aside channels for public access to be 'the electronic marketplace of ideas,' state regulation requires cable operators to provide at least one public access channel, a municipal contract requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums.

Id. at 13a-14a.

Those same criteria (authorized by federal law, mandated by state law, and designated by a franchise authority) will apply to most—if not all—privately operated public access channels, all of which are creatures of federal and state law and local contracts. The holding, therefore, amounts to a *per se* test, meaning that all (or

nearly all) public access channels would be considered constitutional public fora, regardless of the actual nature and degree of government control over the channel and regardless of the particular operator. This adoption of a hard-and-fast rule is inconsistent with this Court's caution against categorical rules and ignores the far more critical issue of whether (and to what extent) there is government control over a public access channel.

By adopting Justice Kennedy's suggestion in his *Denver Area* concurrence that public access channels should be deemed "designated public forum[s] of unlimited character," 518 U.S. at 791, and ignoring this Court's other state action tests, the Majority firmly placed the cart before the horse. It determined first that public access channels are public fora and then determined that the operators of such public fora are therefore state actors. But in *Denver Area*, seven other Justices either rejected or declined to consider Justice Kennedy's suggestion.

Justice Breyer's plurality decision in *Denver Area* explicitly refused to determine the nature of the forum at issue, finding it "premature." *Id.* at 742, 743-66. And Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia), would have held that public access channels *are not* constitutional public fora. *Id.* at 826. As Justice Thomas wrote, "[c]able systems are privately owned and privately managed, and petitioners point to no case in which we have held that government may designate private property as a public forum." *Id.* at 827. Justice Thomas also noted that "regulatory control, and particularly direct regulatory control over a private entity's First Amendment speech rights, could [not] justify creation of a public forum." *Id.* at 829. Justice Thomas concluded that

"the numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of a public forum." *Id.* at 831.[4]

Characterizing public access channels as *per se* public forums is plainly inconsistent with this Court's state actor tests. In addition, the *per se* rule ignores the fact that, as this Court explained in *Denver Area*, public access channels have historically been run in various configurations and, most importantly, by a diverse set of operators: "Municipalities generally provide in their cable franchising agreements for an access channel manager, who is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner." *Denver Area*, 518 U.S. at 761 (plurality opinion). More than twenty years later, that is still the

4. Courts after *Denver Area* have—for the most part—rejected the arguments that public access channels are *per se* public fora. *See, e.g.*, *Clorite v. Somerset Access Television, Inc.*, No. 14-10399, 2016 WL 5334521, at *10 (D. Mass. Sept. 20, 2016) ("courts have routinely held that public access channels are not First Amendment 'public forums'") (internal citation omitted); *Morrone*, 363 F. Supp. 2d at 558 (same); *Glendora*, 1996 WL 721077, at *3 (same); *Glendora v. Hostetter*, 916 F. Supp. 1339, 1341 (S.D.N.Y. 1996) (same); *Glendora*, 893 F. Supp. at 270 (same); *see also Hebrew v. Houston Media Source, Inc.*, No. 09-cv-3274, 2010 WL 2944439, at *6 (S.D. Tex. July 20, 2010) ("[T]his court has found no circuit court or Supreme Court case holding that a public access local cable channel operates as a public forum or that its operator is a state actor."). *But see Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 52 (D. Me. 2002) (predicting that court would treat channel as a designated public forum); *Britton v. City of Erie, Pa.*, 933 F. Supp. 1261, 1268 (W.D. Pa. 1995) (holding that "a public-access cable television channel is a public forum").

case.[5] The Majority's *per se* test threatens to obscure these differences. All cable operators in New York and many other states are *required* to set aside public access channels by a combination of federal law, state regulation, and franchise agreements. Under the Majority's analysis, this arrangement would convert all private operators of these channels—including cable operators like Time Warner—into state actors.[6]

The Second Circuit's failure to follow this Court's tests and its imposition of a *per se* test warrant a grant of certiorari.

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5. There are over two thousand community access stations across the country run by a diverse mix of private non-profit entities, cable operators, educational institutions, governmental entities, and others. *See* Community Media Database, http://communitymediadatabase.org/ (last visited June 19, 2018) (select Community Access TV / Spreadsheet Directory; listing community access stations in each state along with category of operating entity).

6. Courts around the country have acknowledged that forum analysis in this particular context is difficult and lacking in guidance from this Court. *See, e.g.*, *Horton v. City of Houston, Tex.*, 179 F.3d 188 (5th Cir. 1999) ("the public forum doctrine should not be extended in a mechanical way to the very different context of public television-broadcasting"; forum analysis presented a "conundrum," which the court did not ultimately address) (internal citation omitted); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 91, 93 (D. Mass. 2002) (whether public access channel is a public forum is "open to debate" and noting that, "[f]ortunately, this motion does not require the court to resolve the *Denver Area* conundrum"); *see also Egli v. Strimel*, No. 14-cv-6204, 2015 WL 5093048, at *4 (E.D. Pa. Aug. 28, 2015) (*Egli I*) (discussing same).

II. THERE IS A CLEAR CIRCUIT SPLIT—AND WIDE DISAGREEMENT AMONG DISTRICT COURTS—ON WHETHER A PRIVATE OPERATOR OF A PUBLIC ACCESS CHANNEL CAN BE DEEMED A STATE ACTOR AND WHICH TESTS COURTS SHOULD APPLY TO ADDRESS THAT QUESTION

The Majority, concurrence, and dissent below all agree that the circuits are split on a foundational constitutional question: Under what circumstances can a private entity (here a private operator of a public access channel) be deemed a state actor, subject to claims under the First Amendment? In addition to reaching a different answer, the Second Circuit also conflicts with its sister circuits by failing to apply this Court's tests for determining those rare circumstances where private activity can be deemed state action.

A. The Sixth and D.C. Circuits Have Held on Similar Facts That Private Operators of Public Access Channels Are Not State Actors

The Sixth and D.C. Circuits have considered whether private operators of public access channels are state actors. Both Circuits applied this Court's traditional state actor tests and—unlike the Second Circuit—concluded that these private operators are not state actors.

In *Wilcher*, the Sixth Circuit considered a television producer's First Amendment claim against a private operator of a public access channel. *See* 498 F.3d at 518-19. There, the City of Akron had granted a private entity, Time Warner, a nonexclusive franchise to operate the

city's cable television system. In the franchise agreement, Akron required Time Warner to set aside a public access channel "to broadcast programming submitted by members of the community." *Id.* at 518. Time Warner was entitled to promulgate rules and regulations for the public access channel, but—unlike here—these rules were subject to approval by a city official. *Id.* In 2004, Time Warner instituted new rules regarding explicit material, a mandatory administration fee for the submission of videos, and a residency requirement. The city approved those changes, prompting a producer to file suit claiming the new rules violated her First Amendment rights. *Id.*

The district court granted Time Warner's motion to dismiss for failure to allege state action, and the Sixth Circuit affirmed. The Circuit noted that "[i]t is undisputed that First Amendment protections are triggered only in the presence of state action. A private party, acting on its own, cannot ordinarily be said to deprive a citizen of her right to Free Speech." *Id.* at 519. The Court acknowledged that "[a] private entity, such as Time Warner, can be held to constitutional standards 'when its actions so approximate state action that they may be fairly attributable to the state.'" *Id.* (quoting *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000)).

In determining that the cable operator was not a state actor, the court applied the three established "state action" tests to determine "whether private action is fairly attributable to the state." *Id.*

- ***Public Function Test***. The Sixth Circuit rejected the argument that, because some local governments (though not Akron) manage public

access channels, operating a public access channel is necessarily a "public function." The court cited the "relatively stiff test applied by the Supreme Court in *Metropolitan Edison*," which required a showing that the private entity exercise "a power *reserved exclusively to the state*." *Id.* at 519 (citing *Jackson*, 419 U.S. at 351) (emphasis added). The Sixth Circuit concluded that "TV service is not a traditional service of local government ... [and] cannot fairly be characterized as a function traditionally reserved to the state." *Id.*

- ***Compulsion Test***. The Sixth Circuit held that this test was not met because "[a]lthough the franchise agreement provides for a public access channel," plaintiff did not allege that the city had encouraged or coerced the challenged conduct. *Id.* at 519-20.

- ***Joint Action test***. The Sixth Circuit also found no "sufficiently close nexus" between Akron and Time Warner, rejecting the argument that "Time Warner and city officials worked 'hand-in-glove' to enact the [complained of] regulations." *Id.* at 520. Instead, the Sixth Circuit held that the city "simply approved a decision made by a private party per a contractual arrangement between the two." *Id.* That "Time Warner accepted certain regulatory constraints" did not make it a state actor. *Id.*

The Sixth Circuit implicitly rejected the alternate argument that public access channels are *per se* constitutional public fora and the private operators of such channels are therefore state actors. *Id.* at 519.

In *ACM*, the *en banc* D.C. Circuit also applied the traditional state action analysis and determined that the private operator of a public access channel was not a state actor. *See ACM*, 56 F.3d at 123.

In *ACM*, the D.C. Circuit considered the constitutionality of three sections of the 1984 Cable Act (as amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act")). *Id.* at 110. One part of the 1992 Act, section 10(c), authorized cable operators to prohibit programming on PEG (public, educational, or governmental use) channels if the programming was "obscene" or "indecent." *Id.* at 112. In its analysis, the D.C. Circuit considered whether "decisions of cable operators not to carry indecent programs on leased or PEG access channels," decisions permitted by Section 10(c), should be "treated as decisions of the government"—*i.e.*, whether private cable operators who exercise discretion granted by Congress were state actors. *Id.* at 113.

The court applied each of the traditional tests and found no state action.

- ***Public Function Test***. The court held that "determining what programs shall be shown on a cable television system is not traditionally within the exclusive province of government at any level" and the "federal statute authorizing action by private cable operators is therefore not itself sufficient to trigger the First Amendment." *Id.* at 113.

- ***Compulsion Test***. The D.C. Circuit found this test was not met because Section 10(c) merely affords

operators the *choice* to ban certain programming, and held that the statutory provisions coupled with the fact that "a cable operator takes this into account in deciding which programs to carry ... does not convert its refusal to carry indecent programming into state action." *Id.* at 121. In other words, "'[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.'" *Id.* at 116 (quoting *Blum*, 457 U.S. at 1004-05).

- ***Joint Action test***. The *ACM* Court found no "sufficiently close nexus" between the cable operator and the government by virtue of the editorial discretion the government allowed the cable operator to restrict certain types of programming, noting that this regulatory scheme only "restore[d] to cable operators editorial discretion an earlier statute had removed," and did not demonstrate a government nexus. The regulatory scheme, without more, "simply adjusted editorial authority between two private groups" (the cable operators and the producers). *Id.* at 115.

Unlike the Majority below, the D.C. Circuit rejected the suggestion that "by calling leased access and PEG channels 'public forums' they may avoid the state action problem and invoke the line of First Amendment decisions restricting governmental control of speakers because of the location of their speech." *Id.* at 121. The court concluded: "Because we find no state action here and because that essential element cannot be supplied by

treating access channels as public forums, we do not reach petitioners' First Amendment attack on sections 10(a) and 10(c)." *See id.* at 123.

On appeal, this Court, in *Denver Area*, 518 U.S. at 737-42, found that the state actor inquiry was not necessary to determine the constitutionality of the statute and instead considered whether the regulations were sufficiently tailored—leaving that portion of the D.C. Circuit's decision holding that public access channel operators are not state actors undisturbed.

Seven years after *Denver Area* was decided, the D.C. Circuit once again found that the private operator of a public access channel was not a state actor in *Glendora v. Sellers*, No. 03-7077, 2003 WL 22890043 (D.C. Cir. Nov. 25, 2003). There, a public access producer sued a private, nonprofit operator of a public access channel. The district court held that because "decisions regarding the programming on public access cable channels in the District of Columbia [are not alleged to] in any way [be] controlled by the District of Columbia government," "there is no state actor and thus no viable Section 1983 claim." *Glendora v. Sellers*, No. 1:02-cv-00855, slip op. at 6 (D.D.C. March 31, 2003), ECF No. 14. The D.C. Circuit affirmed the district court's opinion. *See* 2003 WL 22890043, at *1.

Given the divergent results *and* analysis among the Second, Sixth, and D.C. Circuits, this Court should grant certiorari to resolve this split and provide guidance on this issue.

B. There is Wide Disagreement Among District Courts About Which Test To Apply on this Issue

The question presented in this case is not only sowing confusion in appellate courts. There is also widespread disagreement among the federal district courts leading to disparate treatment for parties across the country.

District courts nationwide have applied different tests and reached divergent conclusions on the potential constitutional liability of private operators of public access channels. Many courts have held that the private operators are not state actors—but have reached this conclusion by engaging in different analyses. *See, e.g.*, *Loren v. City of New York*, No. 16-cv-3605, 2017 WL 2964817, at *4 (S.D.N.Y. July 11, 2017) (applying compulsion, joint action, and public function tests, and finding public access channel operator was not state actor); *Clorite*, 2016 WL 5334521, at *9 (applying *Lebron* and finding private operator of public access channel not state actor); *Griffin v. Public Access Cmty. Television*, No. 10-cv-602, 2010 WL 3815797, at *2-4 (W.D. Tex. Sept. 27, 2010) (applying compulsion, joint action, and public function tests and finding no state action); *Hebrew*, 2010 WL 2944439, at *6 (same); *Morrone*, 363 F. Supp. 2d at 558 (finding private operator of public access channel not a state actor without analysis); *Huston v. Time Warner Entm't*, No. 03-cv-0633, slip op. (N.D.N.Y. Mar. 25, 2004), ECF No. 31 (same), *aff'd on other grounds*, 127 Fed. Appx. 528 (2d Cir. Mar. 31, 2005); *Glendora*, 1996 WL 721077, at *3 (applying joint action and public function tests and finding no state action); *Glendora v. Marshall*, 947 F. Supp. 707, 712 (S.D.N.Y. 1996) (same); *Glendora*, 893 F. Supp. at 270 (same).

Other district courts have reached the opposite conclusion—that private operators of public access channels *are* state actors. *See, e.g., Demarest*, 188 F. Supp. 2d at 90-91 (applying *Lebron* and finding operator of public access channel a state actor); *Jersawitz v. People TV*, 71 F. Supp. 2d 1330, 1337-1338 (N.D. Ga. 1999) (applying *Lebron* and holding that a private operator of public access channel was government agency); *see also Egli v. Strimel*, No. 14-cv-4204, 2016 WL 1392254, at *2 (E.D. Pa. Apr. 8, 2016) (*Egli II*) (applying *Lebron* and finding an issue of fact as to whether private, nonprofit operator of public access channel was a state actor).

Still other district courts have refused to make the threshold "state action" determination until they had a more complete factual record. *See Egli I*, 2015 WL 5093048, at *3 (declining to engage in state action analysis at pleadings stage); *Egli II*, 2016 WL 1392254, at *2 (subsequent proceeding to *Egli I*, finding issue of material fact regarding state action given evidence that township had "complete control over the content, scheduling, and administration of the" public access channels); *Glendora*, 916 F. Supp. at 1341 (allegations insufficient to determine state action on motion for preliminary injunction and reserving decision following discovery).

III. THE DECISION BELOW RAISES ISSUES OF RECURRING AND NATIONWIDE IMPORTANCE

This Court should grant certiorari because the decision below threatens to erode the protections that this Court has put into place for the last half century to ensure that only the rarest of private entities are subject to constitutional scrutiny. While public access channels

are commonplace throughout the country, the issue raised by the decision below is even more important given the current landscape of new and evolving technology, particularly in social media and other communication platforms.

A. The Decision Below Exposes Public Access Channel Operators to the Considerable Expense of Federal Judicial Review and Other Consequences

As a result of the decision below, the rules, policies and actions of a private operator of a public access channel will now be subject to the expense and distraction of recurring federal judicial review. This is concerning for several reasons. In addition to the costly nature of defending claims in federal court, constitutional claims carry with them the threat of attorneys' fees for the prevailing party. 42 U.S.C. § 1988(b). Nonprofits such as MNN are particularly vulnerable to litigants seeking to use federal constitutional claims as leverage to force settlements or concessions where none are warranted.

The New York legislature—which, according to the Majority, put in motion the very statutory scheme that makes MNN a state actor—also devised a completely different recourse for aggrieved producers. The PSC regularly hears claims by allegedly aggrieved producers. Pet. App. 52a. The decision below would allow aggrieved producers and others to circumvent the PSC grievance process and instead rush into federal court to bring constitutional claims against private entities.

The Second Circuit's *per se* rule would also upset the very purpose of public access television, diverting scarce resources from operations to defending potential federal lawsuits and importing new bureaucracies. Operators would likely be forced to defend administrative decisions such as scheduling changes, suspensions for threats of violence, or simply assigning a producer a less-than-ideal time slot.

A number of other collateral consequences may arise out of the decision below that can, individually or collectively, prove exceedingly costly and difficult for nonprofits such as MNN. For example, should MNN be subject to state sunshine and open meetings laws? Will MNN need to add administrators to manage requests under the Freedom of Information Act (5 U.S.C. § 552 *et seq.*) and its state corollaries? While a city, county, or state routinely deal with such consequences, they are of great significance to a private nonprofit company that lacks the necessary infrastructure to address them.

B. The Decision Below Could Dramatically Expand the Definition of State Action and Public Forum

Courts are routinely faced with the state actor conundrum in new contexts. For example, a New York district court recently had to rule on whether part of President Trump's Twitter account is a constitutional public forum. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 17-cv-5205, 2018 WL 2327290, at *5 (S.D.N.Y. May 23, 2018). There, the court held that a portion of the President's Twitter account—*but not Twitter itself*—was a constitutional public forum

because the government controlled the content of the tweets sent from the President's account. *Id.* at *15. *See also Davison v. Plowman*, 247 F. Supp. 3d 767, 776 (E.D. Va. 2017) (holding that a municipal county's Facebook page was a "limited public forum").

Twitter, YouTube, Facebook, and Instagram are all popular social media venues used for sharing political opinion. And, though they are all privately owned and operated, they are subject to numerous federal and state laws, exist because the government created the Internet, and are utilized by all levels of government. But applying the traditional state actor analysis should still lead to the conclusion that these entities and their employees are not state actors. *See, e.g.*, *Prager Univ. v. Google LLC*, No. 17-cv-06064, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (dismissing First Amendment claims against YouTube and Google); *Shulman v. Facebook.com*, No. 17-cv-00764, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (Facebook not constitutional state actor). Under the new test announced by the Majority, it is not so clear that these entities are divorced from state action.

Private radio stations are another example. Although National Public Radio ("NPR") was created by virtue of the Public Broadcasting Act of 1967 (47 U.S.C. § 396 *et seq.*), most "public" radio is not public at all—stations are private, often non-profit, entities that support their mission through listener and corporate donations.[7] The Majority's decision calls into question whether these private entities

7. *See* American Public Media, *Organizational Structure*, https://www.americanpublicmedia.org/about/org-structure (last visited June 20, 2018).

should be treated as state actors either because they were created by act of government, are heavily regulated, or bear more than a passing resemblance to state-owned broadcasters. *See Abu-Jamal v. Nat'l Pub. Radio*, No. 96-cv-0594, 1997 WL 527349, at *4 (D.D.C. Aug. 21, 1997), *aff'd*, 159 F.3d 635 (D.C. Cir. 1998) ("NPR ... is not a government instrumentality, and is not a state actor for First Amendment purposes.").

Granting certiorari is necessary to resolve a recurring issue not just for operators of public access channels but also for those who own and operate private companies involved in new and changing media platforms.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 21, 2018

APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED FEBRUARY 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 16-4155

DEEDEE HALLECK,
JESUS PAPOLETO MELENDEZ,

Plaintiffs-Appellants,

v.

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE, CITY OF NEW YORK,

Defendants-Appellees.

June 19, 2017, Argued
February 9, 2018, Decided

Before: NEWMAN, JACOBS, and LOHIER, *Circuit Judges.*

Appeal from the December 14, 2016, judgment of the District Court for the Southern District of New York, (William H. Pauley III, District Judge), dismissing for failure to state a valid claim allegations of First Amendment violations against the City of New York and

a private corporation and its employees operating a public access television channel. See *Halleck v. City of New York*, 224 F. Supp. 3d 238 (S.D.N.Y. 2016). The Plaintiffs-Appellants contend that a public access channel is a public forum.

Affirmed as to the City of New York, reversed as to Manhattan Community Access Corporation and its employees, and remanded.

Judge Lohier concurs with a separate opinion; Judge Jacobs concurs in part and dissents in part with a separate opinion.

JON O. NEWMAN, *Circuit Judge*:

This appeal presents the issue of whether the First Amendment's limitation on governmental restriction of free speech applies, in the circumstances of this case, to the operators of public access television channels. More specifically, the main issue is whether the Amendment applies to employees of a non-profit corporation, designated by the Manhattan Borough President to oversee public access TV channels, who are alleged to have suspended individuals involved in public access TV programming from using the corporation's facilities. This issue arises on an appeal by Deedee Halleck and Jesus Papoleto Melendez from the December 14, 2016, judgment of the District Court for the Southern District of New York (William H. Pauley III, District Judge). *See Halleck v. City of New York*, 224 F. Supp. 3d 238 (S.D.N.Y. 2016). The judgment dismissed, for failure to state a valid claim,

the Plaintiffs-Appellants' complaint against Manhattan Community Access Corporation ("MCAC"); three of its employees, Daniel Coughlin, Jeanette Santiago, and Cory Bryce; and the City of New York (the "City"). The complaint alleged violations of 42 U.S.C. § 1983; Article 1, Section 8 of the New York State Constitution; and Article 7 of the New York State Public Officers Law.

We conclude that the public access TV channels in Manhattan are public forums and that MCAC's employees were sufficiently alleged to be state actors taking action barred by the First Amendment to prevent dismissal of the claims against MCAC and its employees, but not against the City. We therefore affirm in part, reverse in part, and remand.

BACKGROUND

Statutory, regulatory, and contractual framework. The Cable Communications Policy Act of 1984 (the "Act") has special provisions for two categories of cable TV channels—leased channels and public, educational, or governmental channels. "[T]o promote competition in the delivery of diverse sources of video programming," 47 U.S.C. § 532(a), the Act requires cable system operators to "designate channel capacity for commercial use by persons unaffiliated with the operator," *id.* § 532(b)(1). These are generally called "leased channels." *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 734, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) ("*Denver Area*").

The Act also authorizes cable franchising authorities to require for franchise renewal "that channel capacity be designated for public, educational, or governmental use," 47 U.S.C. § 531(b), and to require "adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support," *id.* § 541(a)(4)(B). These are what Justice Kennedy's opinion in *Denver Area* called "PEG access channels." 518 U.S. at 781. Public access channels, the P in PEG, are "available at low or no cost to members of the public, often on a first-come, first-served basis." *Id.* at 791.[1]

In New York, a Public Service Commission regulation requires a cable TV system with a capacity for 36 or more channels to "designate . . . at least one full-time activated channel for public access use." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(b)(1). The regulation defines a public access channel as a channel "designated for noncommercial use by the public on a first-come, first-served, nondiscriminatory basis." *Id.* § 895.4(a)(1).

The City awarded cable franchises for Manhattan to Time Warner Entertainment Company, L.P. ("Time Warner"). First Amended Complaint ("FAC") ¶ 30. The

1. Justice Kennedy further explained, "Under many franchises, educational channels are controlled by local school systems, which use them to provide school information and educational programs. Governmental access channels are committed by the cable franchise to the local municipal government, which uses them to distribute information to constituents on public affairs." *Denver Area*, 518 U.S. at 790.

franchise agreement for Northern Manhattan provides that Time Warner will provide four public access channels. The agreement recites that the Manhattan Borough President has designated a not-for-profit, nonmembership corporation to serve as the Community Access Organization ("CAO") for the borough "under whose jurisdiction the Public Access Channels shall be placed for purposes of Article 8 of this Agreement," which applies to public, educational, and governmental services. That CAO is the Defendant-Appellee MCAC, known as Manhattan Neighborhood Network ("MNN").

Allegations of First Amendment violations. Plaintiffs-Appellants Deedee Halleck and Jesus Papoleto Melendez alleged that MNN, three of its employees, and the City violated their First Amendment rights by suspending them from using MNN's public access channels because of disapproval of the content of a TV program that Halleck had submitted to MNN's programming department for airing on MNN's public access channel. This claim is based on the following factual allegations, which we accept as true for purposes of reviewing, *de novo*, the dismissal of the complaint.

Both Halleck and Melendez have been involved in producing public access programming in Manhattan. In July 2012, MNN held an event to mark the opening of the El Barrio Firehouse Community Media Center ("El Barrio Firehouse"). Halleck and Melendez stood outside, interviewing invitees. In August or September 2012, Halleck submitted to MNN for airing on MNN's public access channels a video entitled "The 1% Visits

the Barrio," based on video footage taken at the El Barrio Firehouse opening (the "1% video"). The 1% video presented the Plaintiffs' view that MNN was "more interested in pleasing 'the 1%' than addressing the community programming needs of those living in East Harlem." FAC ¶ 83. MNN aired the 1% video on public access channels in October 2012.

In a letter dated October 11, 2012, defendant Jeanette Santiago, MNN's Programming Director, informed Halleck that she was suspended for three months from airing programs over MNN's public access channels. Santiago stated that the 1% video violated MNN's program content restrictions barring "participation in harassment or aggravated threat toward staff and/or other producers." FAC ¶ 86.[2] The Plaintiffs allege that Halleck was suspended because the 1% video "presented the view that MNN was more interested in pleasing 'the 1%' than addressing the community programming needs of those living in East Harlem." FAC ¶ 97.

In a letter dated August 1, 2013, defendant Daniel Coughlin, MNN's executive director, suspended Melendez indefinitely from all MNN services and facilities. Coughlin claimed that at an encounter in July 2013 Melendez had "pushed him over." FAC ¶ 106. The Plaintiffs allege

2. The letter quoted Melendez's statement in the 1% video that "People of color work in this building and I have to wait until people get fired, they retire or someone kills them so that I can come and have access to the facility here." FAC ¶ 87. Santiago said the letter "incited violence and harassment towards staff and was in direct violation of MNN's 'zero tolerance on harassment.'"

that Melendez was suspended because of the views he expressed in the 1% video. In a letter dated August 9, 2013, Coughlin suspended Halleck for one year from all MNN services and facilities, claiming receipt of complaints about the 1% video. Although Halleck's suspension has ended, she cannot air the 1% video on any public access channels in Manhattan. By letter dated April 24, 2015, defendant Cory Brice,[3] MNN's manager of production and facilitation, confirmed Melendez's indefinite suspension.

District Court opinion. With respect to the Plaintiffs' First Amendment claim against MNN, the District Court recognized that the claim, pursued under 42 U.S.C. § 1983, was viable only if MNN was a state actor because the First Amendment limits only governmental action. Acknowledging that MNN was a private entity, the Court first considered whether its actions might be subject to the First Amendment because "'[a]ctions of private entities can sometimes be regarded as governmental action for constitutional purposes.'" *Halleck*, 224 F. Supp. 3d at 243 (quoting *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995)). The District Court noted that in *Lebron* the Supreme Court had stated that "'where . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.'" *Id.* (quoting *Lebron*, 513 U.S. at 399). The District Court deemed *Lebron*

3. The name was misspelled "Bryce" in the FAC.

inapplicable because the Manhattan Borough President had authority to appoint only two of the thirteen members of MNN's board. *See id.*

The District Court then considered whether the First Amendment might apply to MNN's actions on the theory that a public access channel is a public forum. *See Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (recognizing traditional and designated public forums). Judge Pauley noted that justices of the Supreme Court have taken different positions on the public forum issue, *see Halleck*, 224 F. Supp. 3d at 245 (citing opinions of Justices Kennedy and Thomas with respect to public access channels and Justice Breyer with respect to leased channels), as have courts of appeals and district courts within the Second Circuit, *see id.* at 244-46.

Deeming the issue a "close call," *id.* at 246, Judge Pauley ruled that a public access channel is not a public forum for two reasons. First, he observed that "'[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty.'" *Id.* at 246 (citing *Glendora v. Cablevision Systems Corp.*, 893 F. Supp. 264, 269 (S.D.N.Y. 1995)). Second, he read our Court's decision in *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999), as "implicitly reject[ing] Plaintiffs' argument that public access channels are designated public fora because they are 'required by government fiat.'" *Halleck*, 224 F. Supp. 3d. at 247 (quoting Plaintiffs' opposition to motion

to dismiss at 12). The District Court dismissed the First Amendment claim against MNN (and presumably its employees) for lack of state action.

With respect to the Plaintiffs' First Amendment claim against the City, the District Court noted that "'Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.'" *Id.* at 242 (quoting *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). In the absence of such a policy, the Court dismissed the claim against the City because the Plaintiffs had alleged only that the City was "'aware tha[t] MNN has censored plaintiffs' and other cable access programming.'" *Id.* at 243 (quoting FAC ¶ 126).

With the federal claims dismissed, the District Court declined to exercise pendent jurisdiction over the state law claims and granted the motion to dismiss the complaint.

DISCUSSION

I. First Amendment Claim Against MNN and Its Employees

Because MNN is a private corporation, the viability of the Plaintiffs' First Amendment claim against it and its employees depends on whether MNN's actions can be deemed state action. A nominally private entity can be a state actor in several different circumstances. *See Brentwood Academy v. Tennessee Secondary School*

Athletic Assn., 531 U.S. 288, 296, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001) (outlining seven examples of circumstances in which a private entity may be deemed a state actor).

Our consideration of whether the public access channels in the pending appeal are public forums must begin with the Supreme Court's decision in *Denver Area*, a case that generated six opinions spanning 112 pages of the United States Reports. The case concerned the constitutionality of three provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), Pub. L. No. 102-385, §§ 10(a), 10(b), and 10(c), 106 Stat. 1460, 1486 (codified at 47 U.S.C. §§ 532(h), 532(j), and note following § 531). Sections 10(a) and 10(b) apply to leased channels.[4] Section 10(c) applies to public access channels, with which we are concerned on this appeal. It requires the Federal Communications Commission to promulgate regulations that permit a cable operator to prohibit "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." 1992 Act § 10(c).

The Supreme Court ruled section 10(a) constitutional, and sections 10(b) and 10(c) unconstitutional. *See Denver Area*, 518 U.S. at 733, 768. With respect to section 10(c), the only provision applicable to public access channels, the

4. Section 10(a) permits a cable operator to prohibit "patently offensive" programming. 1992 Act § 10(a). Section 10(b) requires the Federal Communications Commission to promulgate regulations that require cable operators to segregate "indecent" programming, place it on a single channel, and block access unless a viewer requests access. *Id.* § 10(b).

vote to invalidate was five to four with the Justices issuing four opinions, summarized in the margin.[5]

Pertinent to the pending appeal, five Justices expressed differing views on whether public access channels were public forums. Justice Kennedy, with whom Justice Ginsburg concurred, said, "A public access channel is a public forum." *Id.* at 783. He pointed out, "'They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.'" *Id.* at 791-92 (quoting H.R. Rep. No. 98-934, at 30 (1984)). He further explained, "It is important to understand that public access channels

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5. Justice Breyer, writing for himself and Justices Stevens and Souter, voted to invalidate section 10(c) because "the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end." *Denver Area*, 518 U.S. at 766.

Justice Kennedy, writing for himself and Justice Ginsburg, acknowledged that Congress has "a compelling interest in protecting children from indecent speech," but voted to invalidate section 10(c) because it was not "narrowly tailored to serve a compelling interest." *Id.* at 805-06.

Justice O'Connor voted to uphold section 10(c) on the ground that it was a "permissive," sufficiently "tailored" provision that served "the well-established compelling interest of protecting children from exposure to indecent material." *Id.* at 779-80.

Justice Thomas, writing for himself and Chief Justice Rehnquist and Justice Scalia, voted to uphold section 10(c) on the ground that the public access programmers could not challenge a scheme that restricted the free speech rights of cable operators. *Id.* at 823.

are public fora created by local or state governments in the cable franchise," *id.* at 792, and added, "[W]hen a local government contracts to use private property for public expressive activity, it creates a public forum," *id.* at 794.

On the other hand, Justice Thomas, with whom Chief Justice Rehnquist and Justice Scalia concurred, said that a public access channel is not a public forum. His reason: a public access channel is privately owned. *See id.* at 826-31. That point precipitated an exchange between Justices Thomas and Kennedy as to whether the relationship between the governmental franchising authority and the operator of the cable system renders nominally private property, a public access channel, a designated public forum.

Justice Thomas acknowledged the Supreme Court's statement that "a public forum may consist of 'private property dedicated to public use.'" *Id.* at 827 (quoting *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 801, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)). But, he pointed out, the quoted statement "refers to the common practice of formally dedicating land for streets and parks when subdividing real estate for developments." *Id.* "Such dedications," he continued, "at least create enforceable public easements in the dedicated land." *Id.* Thus, he concluded, "To the extent that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum." *Id.* at 828.

In reply, Justice Kennedy explained, "[I]n return for granting cable operators easements to use public rights-of-way for their cable lines, local governments have bargained for a right to use cable lines for public access channels. . . . [N]o particular formalities are necessary to create an easement. . . . [W]hen a local government contracts to use private property for public expressive activity, it creates a public forum." *Id.* at 793-94.

In Part II of *Denver Area*, Justice Breyer, with whom Justices Stevens, O'Connor, and Souter concurred, explicitly declined to express a view as to whether a public access channel is a public forum. *See id.* at 742 ("We therefore think it premature to answer the broad questions that Justices Kennedy and Thomas raise in their efforts to find a definitive analogy, deciding, for example, the extent to which private property can be designated a public forum[.]").[6]

In view of the statutory, regulatory, and contractual framework under which this case arises and the purpose for which Congress authorized public access channels, we are persuaded by the conclusion reached by Justices Kennedy and Ginsburg. A public access channel is the electronic version of the public square. Without determining whether a public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square, we conclude that where, as here, federal law authorizes setting aside channels for public

6. As to leased channels, Justice Breyer said, "[I]t is unnecessary, indeed, unwise, for us definitively to decide whether or how to apply the public forum doctrine to [them]." 518 U.S. at 749.

access to be "the electronic marketplace of ideas," state regulation requires cable operators to provide at least one public access channel, a municipal contract requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums.[7]

Because facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 265-68, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) (regulation issued by state university Board of Curators governing use of university buildings and grounds); *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 169, 176, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976) (order issued by state employment commission governing employee speech at public school board meeting). In the pending case, however, the facilities deemed to be public forums are public access channels operated by a private non-profit corporation. In this situation, whether the First Amendment applies to the individuals who have taken the challenged actions in a public forum depends on whether they have a sufficient connection to governmental authority to be deemed state actors. That connection is established in this case by the fact that the Manhattan Borough President designated

7. We note that a State regulation permits the cable operator to prohibit obscenity or other content unprotected by the First Amendment. *See* N.Y. Com. Codes R. & Regs. tit. 16, § 895.4(c)(8).

MNN to run the public access channels. The employees of MNN are not interlopers in a public forum; they are exercising precisely the authority to administer such a forum conferred on them by a senior municipal official. Whether they have taken the actions alleged and, if so, whether they have thereby violated First Amendment limitations are matters that remain to be determined in further proceedings.

The non-municipal defendants invoke our decision in *Loce v. Time Warner Entertainment Advance/ Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999), to resist application of First Amendment restrictions to their alleged conduct. However, *Loce* neither ruled nor implied that a public access channel was not a public forum. *Loce* concerned leased channels, not public access channels. The different purposes for which Congress required leased channels and authorized franchising authorities to require public access channels underscore why the latter are public forums. Congress required leased channels in order "to promote competition" with commercial channels "in the delivery of diverse sources of video programming." 47 U.S.C. § 532(a). The explicit purpose of public access channels was to give the public an enhanced opportunity to express its views. As the relevant committee said, public access channels are "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 98-934, at 30 (1984). Leased channels concern economics. Public access channels concern democracy.

We note that the defendant in *Loce* was Time Warner, the operator of a cable system carrying the leased channel, not, as in this case, the entity operating the public access channels. And, we noted in *Loce*, "The record offer[ed] no evidence that Time Warner and the municipal franchising authorities jointly administer leased access channels." *Id.* at 267. Although Time Warner, the cable system operator, and the City do not jointly administer the public access channels in the pending case, MNN administers those channels under explicit authorization from a senior municipal official.

We acknowledge that other courts have not considered public access channels to be public forums. In *Alliance for Community Media v. FCC*, 56 F.3d 105, 312 U.S. App. D.C. 141 (D.C. Cir. 1995) (*in banc*), eight members of the eleven member *in banc* court found "no state action . . . because that essential element cannot be supplied by treating access channels as public forums." *Id.* at 123. As pointed out above, when that decision was reviewed and reversed in part by the Supreme Court in *Denver Area*, two Justices (Kennedy and Ginsburg) explicitly disagreed with the D.C. Circuit's view about public access channels and four Justices (Stevens, O'Connor, Souter, and Breyer) found it unnecessary to consider that view.[8]

Several District Courts have considered whether a public access channel is a public forum and have reached conflicting results. *Compare Egli v. Strimel*, No. 14-cv-

8. In *Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir. 2007), the Sixth Circuit, without deciding whether a public access channel might be deemed a public forum, ruled that the operator of a cable system carrying a public access channel was not a state actor.

6204, 2015 U.S. Dist. LEXIS 114312, 2015 WL 5093048, at *4 (E.D. Pa. Aug. 28, 2015) (public forum); *Brennan v. Williams Paterson College*, 34 F. Supp. 3d 416, 428 (D.N.J. 2014) (public forum plausibly alleged); *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 50 (D. Me. 2002) (recognizing applicability of public forum analysis); *Jersawitz v. People TV*, 71 F. Supp. 2d 1330, 1341 (N.D. Ga. 1999) (public forum), *with Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552, 558 (E.D.N.Y. 2005) (not public forum); *Glendora v. Tele-Communications, Inc.*, No. 96-cv-4270 (BSJ), 1996 U.S. Dist. LEXIS 18650, 1996 WL 721077, at *3 (S.D.N.Y. Dec. 13, 1996) (same); *Glendora v. Cablevision Systems Corp.*, 893 F. Supp. 264, 270 (S.D.N.Y. 1995) (same); *see also Glendora v. Hostetter*, 916 F. Supp. 1339, 1341 (S.D.N.Y. 1996) (noting that two of the decisions cited above had ruled that public access channels are not public forums).

With all respect to those courts that have expressed a view different from ours, we agree with the view expressed by Justices Kennedy and Ginsburg in *Denver Area*. Public access channels, authorized by Congress to be "the video equivalent of the speaker's soapbox" and operating under the municipal authority given to MNN in this case, are public forums, and, in the circumstances of this case, MNN and its employees are subject to First Amendment restrictions.

II. Municipal Liability

We agree with the District Court that the complaint does not allege actions by the City that suffice to make it liable for the Plaintiffs' federal claims. Municipal liability

under section 1983 arises when the challenged action was taken pursuant to a municipal policy. *See Monell*, 436 U.S. at 691-95. No such policy has been alleged in this case, much less the required "direct causal link between a municipal policy or custom and the alleged constitutional deprivation," *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

CONCLUSION

The judgment of the District Court is reversed as to MNN and its employees, affirmed as to the City, and remanded for further proceedings.

LOHIER, *Circuit Judge, concurring*:

I fully agree with the majority opinion. I write separately to add only that in the specific circumstances of this case we might also rely on the public function test to conclude that MNN and its employees are state actors subject to First Amendment restrictions when they regulate the public's use of the public access channels at issue here. "Under the public function test, state action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity." *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 264-65 (2d Cir. 2014) (quotation marks omitted). A private entity's regulation of speech in a public forum is a public function when the State has expressly delegated the regulatory function to that entity. *See, e.g.*, *Lee v. Katz*, 276 F.3d 550, 555-56 (9th Cir. 2002).

The dissent recognizes this established doctrine, Partial Dissent at 4-5, but maintains that MNN's public access channels are not public forums because they are merely "entertainment facilit[ies]" that, as such, do not involve a function "traditionally exclusively reserved to the State," *id.* at 5 (quoting *Halleck v. City of New York*, 224 F. Supp. 3d 238, 246 (S.D.N.Y. 2016)). Other courts have this view. *See, e.g.*, *Wilcher v. City of Akron*, 498 F.3d 516, 519 (6th Cir. 2007) ("TV service is not a traditional service of local government.").

But the distinction between entertainment and public speech is perilous as a matter of constitutional law and in this case unfounded as a matter of fact.

"The Free Speech Clause exists principally to protect discourse on public matters, but ... it is difficult to distinguish politics from entertainment, and dangerous to try." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) (Scalia, J.). "What is one man's amusement, teaches another's doctrine." *Id.* (quoting *Winters v. New York*, 333 U.S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840 (1948)). Depending on one's point of view, political debates as far back as Lincoln and Douglas, rock concerts in Central Park, *see Ward v. Rock Against Racism*, 491 U.S. 781, 790-91, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989), and the comedian's late night television routine, *see FCC v. Pacifica Found.*, 438 U.S. 726, 744-47, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978), might count as entertainment, or politics, or something in between. So simply dismissing a public access channel as an "entertainment facility" fails to remove it from the category of a public forum.

One look at MNN's website reveals that MNN's public access channels largely offer "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 791, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quotation marks omitted). The programming relates to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy. *See* www.mnn.org/schedule (last visited February 1, 2018); Majority Op. at 18; *23-34 94th St. Grocery Corp. v. New York City Bd. of Health*, 685 F.3d 174, 183 n.7 (2d Cir. 2012) (taking judicial notice of a website).

Appendix A

As the majority suggests without saying it outright, New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels. For this reason, on this record, I agree that MNN and its employees are subject to First Amendment restrictions.

Appendix A

JACOBS, *Judge*, concurring in part and dissenting in part:

I join the opinion of the Court in affirming the dismissal of the claims against the municipal defendants: the complaint fails to allege actions by the city that amount to "municipal policy." Op. at 20; *Monell*, 436 U.S. at 691-95. I respectfully dissent because I would also affirm the dismissal of the claims against Manhattan Community Action Corporation, otherwise known as Manhattan Neighborhood Network ("MNN"). The controlling precedent is *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999) (Kearse, J.), which ruled that a private corporation operating a television station under a city franchise agreement and in accordance with federal statute is not a state actor. The opinion of the Court wholly relies on a distinction between the leased access channel at issue in *Loce* and the public access channel at issue in this case. That tenuous distinction is unconvincing and in any event unsupported by our First Amendment jurisprudence.

* * *

"[T]he United States Constitution regulates only the Government, not private parties." *United States v. Int'l Bhd. Of Teamsters*, 941 F.2d 1292, 1295 (2d Cir. 1991). "A plaintiff pressing a claim of violation of his constitutional rights" under 42 U.S.C. § 1983 is therefore "required to show state action." *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir. 2003).

Appendix A

MNN is a private corporation. A private entity may become a state actor only under the following limited conditions:

> "(1) the entity acts pursuant to the 'coercive power' of the state or is 'controlled' by the state ('the compulsion test'); (2) when the state provides 'significant encouragement' to the entity, the entity is a 'willful participant in joint activity with the state,' or the entity's functions are "entwined" with state policies ('the joint action test' or 'close nexus test'); or (3) when the entity "has been delegated a public function by the state," ('the public function test')."

Sybalski v. Independent Group Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008)(citing *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)).

* * *

MNN cannot be cast as a state actor by application of the tests for compulsion or joint action.

Compulsion. "Action taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999). MNN's designation in a franchise agreement and regulation by a municipal commission do not in and of themselves demonstrate that MNN is "controlled" or "compelled"

by the state. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 543-44, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987) (finding that granting of a corporate charter by Congress does not create state action because "[e]ven extensive regulation by the government does not transform the actions of the regulated entity into those of the government."). To allege compulsion, a plaintiff must show that the government compelled the particular activity that allegedly caused the constitutional injury. *See Sybalski*, 546 F.3d at 257-58. The amended complaint has no allegation of government involvement in the appellants' suspensions from which state action can be inferred.

Joint Action. The "decisive factor" in entwinement analysis is the "amount of control [the municipality] could potentially exercise over the [private corporation's] 'internal management decisions.'" *Grogan*, 768 F.3d at 269 (internal citations omitted). A corporation thus becomes "part of the Government for the purposes of the First Amendment" when the Government retains "permanent authority to appoint a majority of the directors of that corporation." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1999). The city's power of appointment is limited to two of MNN's thirteen board members, and is clearly insufficient to support a finding of state action. *See Grogan*, 768 F.3d at 269. Nor do the statutory guidelines for cable access or the borough's oversight activities establish joint action between the Government and MNN. "[A] regulatory agency's performance of routine oversight functions to ensure that a company's conduct complies with state law

does not so entwine the agency in corporate management as to constitute state action." *Tancredi*, 316 F.3d at 313; *see also Sybalski*, 546 F.3d at 258-59.

* * *

This leaves the "public function" test as the only remaining vehicle by which MNN's activities may be considered state action. Judge Lohier's concurring opinion undertakes to establish state action under the "public function" test.

A private entity performs a "public function" when its specific conduct at issue in the complaint has historically been "an exclusive prerogative of the sovereign." *Grogan v. Blooming Grove Volunteer Ambulance Corp.*, 768 F.3d 259, 265-67 (2d Cir. 2014) (internal quotation marks omitted). It is argued that one such "traditional and exclusive public function" is "the regulation of free speech in a public forum." *Halleck*, 224 F. Supp. 3d at 244; *cf. Hotel Emps. & Restaurant Emps. Union, Local 100 v. N.Y.C. Dep't of Parks & Recreation*, 311 F.3d 534, 544 (2d Cir. 2002). That presents the question whether a public-access channel is a public forum. Contrary to the view expressed in Judge Lohier's opinion, it is not. That is because, as Judge Pauley observed, "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." *Id.* at 246; *see also Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 740, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) (declining to "import" public forum doctrine into the analysis of

speech on cable access channels). And it is fortunate for our liberty that it is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment.

Consideration of MNN's status as a state actor therefore requires an examination of its function, guided by these principles. Instead, the opinion of the Court proceeds as follows: private property leased by the Government for public expressive activity creates a public forum, Op. at 16; a facility deemed to be a public forum is usually operated by Government, *id.*; action taken at a facility determined to be a public forum usually is state action, *id.* at 17; the First Amendment applies to a person acting at such a facility if the person has a sufficient connection to Government authority to constitute state action, *id.*; and here, the Borough President's designation of MNN to administer the public-access station is sufficient. The opinion of the Court thus drops a link: that the private entity (MNN) performs a function that has been the exclusive (or near-exclusive) function of Government.

The appellants contend that MNN is a "state actor" under the public function test because a public access channel is a public forum. This approach is inconsistent with our *Loce* precedent that administering leased access channels does not constitute state action. The holding in *Loce* applies with (at least) equal analytical force to the administration of public-access channels:

> The fact that federal law requires a cable operator to maintain leased access channels and the fact that the cable franchise is granted by a local government are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as state action. Nor does it suffice that cable operators, in their management of leased access channels, are subject to statutory and regulatory limitations.

191 F.3d at 267. The salient distinction between leased access and public-access channels is that federal law requires leased-access channels and merely authorizes public-access channels, 47 U.S.C. §§ 531(a), 532(b)(1). So, if anything, the *Loce* analysis applies to public-access channels *a fortiori*.[1]

The opinion of the Court distinguishes *Loce* largely on the basis that there is a fee for leased access whereas public-access is free. That seems to be the whole of it: "Leased channels concern economics. Public access channels concern democracy." Op. at 18; *see also* Concurring Op. at 3. But not every well-turned phrase is good law. The grant of access to facilities at no cost

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1. Judge Lohier's observation that public speech blends into entertainment is valid, and increasingly so. I do not suggest otherwise. Our point of respectful disagreement is whether, under the public function test, the administration of a cable access channel (whatever its offerings) is a traditional prerogative of sovereignty. The balance of courts hold that it is not; and the Second Circuit in *Loce* is one of them.

by non-commercial entities does not transform property into a public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). Nor does a free, public television broadcast constitute a public forum, even if it is directed by statute to serve the "public interest." *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

We have not expressly applied *Loce* to the administration of public-access channels; but the Sixth Circuit has. In *Wilcher v. City of Akron*, 498 F.3d 516, 519-21 (6th Cir. 2007), that court ruled that there was no state action, relying in part on *Loce*. While *Wilcher* did not discuss public forum doctrine, as the concurring opinion concedes, Concurring Op. at 1-2, its ruling that the administration of public access channels was not a public function is an implicit rejection of the theory advanced by Halleck and the opinion of the court. 498 F.3d at 519.

As the Sixth Circuit concluded, the logic of *Loce* applies with equal force to public-access programming. Cable operators are equally obligated to provide both "forums": federal law requires them to set aside a portion of their capacity for leased access, 47 U.S.C. § 532(b)(1), and permits franchising authorities to require (as the relevant one does) a similar set-aside for public access, *id.* § 531(a). And in both instances the operators are prohibited by law from exercising editorial control, *see id.* §§ 532(c)(2), 531(e).

The D.C. Circuit reached the same result in *Alliance for Community Media v. F.C.C. ("ACM")*, 56 F.3d 105, 312 U.S. App. D.C. 141 (D.C. Cir. 1995). Sitting *in banc*, the D.C. Circuit rejected a First Amendment challenge to portions of a federal statute (and its implementing regulations) that permitted cable operators to block certain non-obscene programming on leased-access *and* public-access channels alike. It reasoned in part that a public-access channel is not a public forum. *Id.* at 121, 123 (rejecting the label of "public forum" and holding that cable access channels are not "so dedicated to the public that the First Amendment confers a right to the users to be free from any control by the owner of the cable system"); *see also Hudgens v. NLRB*, 424 U.S. 507, 509, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976) (finding the dedication of private property as a public forum "attenuated," "by no means" constitutionally required, and untenable).

The *in banc* court also held that there was no state action under a compulsion theory because the government did not coerce cable operators to act; rather, the law authorized but did not require the prohibition of "indecent" programming. *Id.* at 116 ("Rather than coerce cable operators, section 10 gives them a choice."), 118 (rejecting that mere "encouragement" by the Government could amount to state action).

When that case was reversed in part and affirmed in part, *sub nom. Denver Area Educ. Telecommunications Consortium, Inc.*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888, the Supreme Court ruled on the constitutionality of the indecent language statute and its implementing

regulations without however deciding the issue presented in our case: whether the administration of leased-access and public-access programming by private entities constitutes state action. The chief concern of the Supreme Court's opinion—the censorship scheme that constituted the Government action at issue, *see* 518 U.S. at 737—is absent here. The D.C. Circuit's *in banc* holding on the status of public access (set out below) was thus left intact:

> Petitioners think that by calling leased access and [public access] channels "public forums" they may avoid the state action problem and invoke the line of First Amendment decisions restricting governmental control of speakers because of the location of their speech. But a "public forum," or even a "nonpublic forum," in First Amendment parlance is government property. It is not, for instance, a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee. The Supreme Court uses the "public forum" designation, or lack thereof, to judge "restrictions that the government seeks to place on the use of *its* property." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992) (italics added). State action is present because the property is the government's and the government is doing the restricting.

ACM, 56 F.3d at 121.

In its discussion of *Denver Area*, the opinion of the Court parses and weighs the *dicta* of individual Justices on an issue that the Court did not disturb: the D.C. Circuit's holding that public forum analysis was inapplicable to leased and public cable access channels. On that score, the D.C. Circuit's holding is consonant with the approach to cable access channels in the Second and Sixth Circuits. Moreover, the exchanges among the various Supreme Court opinions adumbrate support for that holding rather than otherwise.

As the opinion of the Court observes, Justice Kennedy, writing for himself and one other Justice, would have held that a public-access channel is a public forum. But three justices would have held that they are not. Four justices in the plurality observed that it was "unnecessary, indeed, unwise" to decide the question; but one reason they adduced for avoiding the question is suggestive: "[I]t is not at all clear that the public forum doctrine should be imported wholesale into the area of common carriage regulation." 518 U.S. at 749. If I made my living construing tea-leaves, I would say that a majority of Justices teetered in favor of the D.C. Circuit's holding. But the insights gleaned from the *dicta* of the various Justices are tentative and indirect, take no account of intervening changes in the Court's composition, and are wholly unreliable as support for any analysis that should decide this appeal.

At least four district judges in this circuit have taken up this issue, three of them in unrelated cases brought by

a single busy *pro se* litigant. In *Glendora v. Cablevision Systems Corp.*, 893 F. Supp. 264 (S.D.N.Y. 1995), Judge Brieant agreed with the *ACM* opinion of the District of Columbia Circuit, *id.* at 270; described the "two general approaches ... to determine whether seemingly private action is in fact state action," *id.* at 269 (quoting *Jensen v. Farrell Lines, Inc.*, 625 F.2d 379, 384 (2d Cir. 1980)); and ruled that neither the "state-function approach" nor the "symbiotic relationship" approach supported state action in the administration of public-access programming. *Id.* at 269-70. In *Glendora v. Hostetter*, 916 F. Supp. 1339 (S.D.N.Y. 1996), then-District Judge Parker denied a preliminary injunction in part because he was "not persuaded at this time that Glendora's constitutional rights are implicated," citing *ACM* and Judge Brieant's opinion on state action, *id.* at 1341. In *Glendora v. Tele-Communications, Inc.*, 1996 U.S. Dist. LEXIS 18650, 1996 WL 721077 (S.D.N.Y. 1996), Judge Jones cited and (in substance) replicated the analysis in Judge Brieant's opinion, and dismissed the complaint. In *Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552 (E.D.N.Y. 2005), Judge Spatt denied a motion for a preliminary injunction in part because "it is clear that" the cable provider "is not a state actor" and "*courts have routinely held that public access channels are not First Amendment 'public forums' for the purposes of state action*," citing *ACM*, Judge Brieant's opinion, and Judge Parker's opinion. *Id.* at 558 (emphasis added).

Loce, which in my view controls, was issued after *ACM* and *Denver Area*, and after the cases of *Glendora*, *Glendora* and *Glendora*.

A ruling in favor of MNN will be consistent with our precedent in *Loce*. The majority conclusion that MNN is a state actor opens a split with the Sixth Circuit; considerably worse, it opens a split with the Second Circuit.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED DECEMBER 13, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15cv8141

DEEDEE HALLECK, *et ano.*,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

OPINION & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs DeeDee Halleck and Jesus Papoleto Melendez—cable public access producers in Manhattan—assert claims under 42 U.S.C. § 1983 and the First Amendment to the United States Constitution (the "First Amendment Claims"); Article 1, Section 8 of the New York State Constitution (the "State Free Speech Guarantee"); and Article 7 of the New York Public Officers Law (the "Open Meeting Law") against Defendants the City of New York, Manhattan Community Access Corporation (operating as the Manhattan News Network or "MNN"),

Daniel Coughlin, Jeannette Santiago, Cory Brice, and Iris Morales. Plaintiffs seek, among other things, injunctive relief restraining Defendants from interfering with Plaintiffs' exercise of their free speech rights.[1]

Defendants move to dismiss the Amended Complaint. Defendants' motion to dismiss is granted with respect to Plaintiffs' First Amendment Claims. This Court declines to exercise jurisdiction over Plaintiffs' remaining state-law claims—the State Free Speech Guarantee and the Open Meeting Law.

BACKGROUND

The following facts are derived from the Amended Complaint and presumed true for purposes of this motion.

A. Public Access Channels

Cable operators must obtain franchises from local governments to lay the cable or optical fibers needed to reach subscribers. (Am. Compl. ¶¶ 15-16.) As a condition for granting those franchises and their attendant benefits, most local governments require cable operators to dedicate some channels for programming by the public on a first-come, first-serve basis (i.e., "public access

1. Although the Amended Complaint also seeks compensatory and punitive damages, Plaintiffs appear to acknowledge that 47 U.S.C. § 555a(a) precludes the award of monetary damages in actions asserting violations of the Constitution arising from the regulation of cable television. *See, e.g. Coplin v. Fairfield Pub. Access Television Comm.*, 111 F.3d 1395, 1407 (8th Cir. 1997).

channels"). Such channels were encouraged by the Cable Communications Policy Act of 1984 (the "1984 Cable Act"), which established that "franchising authorit[ies] . . . may require as part of a cable operator's proposal for a franchise renewal . . . that channel capacity be designated for public, educational, or governmental use." 47 U.S.C. § 531(b). The 1984 Cable Act further established that "cable operator[s] shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section" except for programs that are "obscene or are otherwise unprotected by the Constitution of the United States." 47 U.S.C. §§ 531(e), 544(d). In New York State, regulations promulgated by the Public Service Commission ("PSC") require that every "franchisee of a cable television system with a channel capacity of 36 or more channels shall designate . . . at least one full-time activated channel for public access use." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(b)(1). Those regulations define public access channels as those "designated for noncommercial use by the public on a first-come, first-served, nondiscriminatory basis." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(a)(1). They prohibit "editorial control" except for "measures as may be authorized by Federal or State law to prohibit obscenity or other content unprotected by the First Amendment of the United States Constitution." 16 N.Y.C.R.R §§ 895.4(c)(8)-(9).

The City of New York awarded cable franchises to Time Warner Entertainment Company, L.P. ("Time Warner"). (Am. Compl. ¶ 30.) Under its franchise agreements, Time Warner must reserve public access

channels to be administered by an "independent, not-for-profit, membership corporation" (known as a community access organization or "CAO") designated by the Manhattan Borough President. (Am. Compl. ¶¶ 31-32.) Under the franchise agreements, "[t]he CAO shall maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis to the extent required by applicable law." (Am. Compl. ¶ 33.)

The Manhattan Borough President designated MNN to administer Manhattan's public access channels. (Am. Compl. ¶ 34.) MNN's stated mission is to "ensure the ability of Manhattan residents to exercise their First Amendment rights through moving image media to create opportunities for communication, education, artistic expression and other non-commercial uses of video facilities on an open and equitable basis." (Am. Compl. ¶ 37.)[2] Coughlin is MNN's Executive Director, Santiago is MNN's Programming Director, and Brice is MNN's Manager of Production and Facilitation. (Am. Compl. ¶¶ 11-14.) MNN maintains a facility in East Harlem known as MNN El Barrio. (Am. Compl. ¶ 38.) The Manhattan Borough President chooses two of MNN's thirteen-member Board of Directors. (Am. Compl. ¶ 36.)

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2. Manhattan Neighborhood Network Policies, available at http://www.mnn.org/sites/default/files/mnn_policies_may2015.pdf (last visited December 12, 2016)).

B. Plaintiffs' Suspension from MNN

In December 2011, Halleck and others were denied entry to an MNN board meeting. (Am. Compl. ¶¶ 41-43.) On March 14, 2012, Plaintiffs attended the MNN Board of Directors quarterly meeting pursuant to an invitation from Coughlin. (Am. Compl. ¶ 51.) After Halleck began videotaping the meeting, the MNN board abruptly adjourned. (Am. Compl. ¶ 55.) Shortly thereafter, Defendant Morales spoke with Plaintiff Melendez and, for reasons that are unclear from the Amended Complaint, called him "a traitor." (Am. Compl. ¶ 59.)

On March 23, 2012, Melendez met with Morales regarding MNN's community leadership program. (Am. Compl. ¶ 64.) Morales screamed at him, threw papers and lightly struck him. Hearing the screams, an MNN security guard entered Morales's office and Melendez left. (Am. Compl. ¶¶ 67-68.) In April 2012, Coughlin informed Melendez that Morales had withdrawn the invitation for Melendez to participate in the community leadership program "due to conduct incompatible with the program's team-building and open communications values," such as his "confrontational, disrespectful and loud behavior on March 23." (Am. Compl. ¶¶ 70-71.) Plaintiffs surmise that the real reason for withdrawing the invitation was because Melendez had attended the MNN board meeting, which Halleck videotaped.

In July 2012, MNN held an invitation-only formal ceremony for MNN El Barrio which was attended by many New York City politicians. (Am. Compl. ¶¶ 72-73.)

Appendix B

Although Halleck and Melendez were not invited, they stood outside to video record and interview attendees, including Morales' boyfriend, Joseph Figueroa. When Halleck asked him to comment about public access, Figueroa responded, "Don't f--- with me." (Am. Compl. ¶ 76.) When Melendez responded, "Hey f--- you," Figueroa rushed at him. (Am. Compl. ¶ 77.) Later, Halleck taped Melendez making the following statement:

> You know what's funny? I got to wait for my people to stop working in this building so that I can gain access to it. Do you understand what I'm saying? Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or someone kills them so that I can come and have access to the facility here. Because I am being locked out by people of color. There's irony for you.

(Am. Compl. ¶ 81.) In August or September 2012, Halleck submitted her July 2012 footage for broadcast as a program titled "The 1% Visits the Barrio" to air on MNN. That program presented MNN as an organization more interested in pleasing "the 1%" than the East Harlem community.[3]

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3. The video is available at https://www.youtube.com/watch?v=QEbMTGEQ1xc . The incident with Figueroa begins around the one minute and forty-second mark, and Melendez's statement about people of color begins around the twenty-one minute and twenty-second mark.

Appendix B

In October 2012, Santiago informed Halleck that she was suspended for three months because her program, "The 1% Visits the Barrio," contained footage in which Melendez made statements intended to incite violence and harassed staff in violation of MNN program content restrictions. (Am. Compl. ¶¶ 85-87.) Coughlin denied Halleck's appeal of her three-month suspension. (Am. Compl. ¶ 94.)

In July 2013, Coughlin rebuffed Plaintiffs' inquiries regarding Melendez's status at MNN. (Am. Compl. ¶¶ 98-100.) Then in August 2013, Coughlin suspended Melendez from all MNN services and facilities, asserting that Melendez had threatened and pushed him. (Am. Compl. ¶¶ 104-07.) Referencing the July 2013 encounter, Coughlin also suspended Halleck for one year, and asserted that MNN continued to receive complaints about "The 1% Visits the Barrio." (Am. Compl. ¶¶ 111-13.) While Halleck's suspension has lapsed, she is still not permitted to air "The 1% Visits the Barrio" or any other program with Melendez. Plaintiffs allege that the City is aware of these suspensions. (Am. Compl. ¶ 126.)

LEGAL STANDARD

On a motion to dismiss, the factual allegations in a complaint are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v.*

Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted); *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010). However, a claim must rest on "factual allegations sufficient to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A pleading offering "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" fails to state a claim. *Iqbal*, 556 U.S. at 678 (citation omitted).

DISCUSSION

"[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976). Section 1983 provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage of any state subjects, or causes to be subjected, any . . . person . . . to the deprivation of any [federally protected] rights, privileges, or immunities . . . shall be liable to the party injured . . ."[4]

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4. The State Free Speech Guarantee establishes that "[e]very citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." It "was added [to New York's Constitution] in 1821 as part of the New York Bill of Rights, which was essentially based on the Bill of Rights contained in the United States Constitution." *SHAD Alt. v. Smith Haven Mall*, 66 N.Y.2d 496, 500, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985). The State Free Speech Guarantee is generally "interpreted consistently with the Federal Constitution."

Appendix B

Defendants move to dismiss, arguing that (1) the City took no action concerning Plaintiffs' suspension, and (2) MNN and its employees are not state actors and therefore not liable for any federal civil rights violation.

A. First Amendment Claims Against the City

The Supreme Court has "conclu[ded] that Congress . . . intend[ed] municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). However, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell*, 436 U.S. at 691. "Plaintiffs who seek to impose liability on local governments under § 1983 must prove that action pursuant to official municipal policy caused their injury. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 60-61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) (internal quotation marks and citations omitted). The "first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, 915 F. Supp. 2d 574, 623 n.21 (S.D.N.Y. 2013).

Appendix B

In *Jersawitz v. People TV*, 71 F. Supp. 2d 1330 (N.D. Ga. 1999), the court addressed substantially similar allegations by a public access producer against a municipality. There, the City of Atlanta selected People TV to manage public access channels in accord with its cable franchise agreement. When a public access producer sued Atlanta and People TV after being barred from the facility, the court dismissed claims against Atlanta for the following reasons:

> There is no evidence that the City itself took any action in violation of Plaintiff's constitutional rights under the First Amendment or that it had a policy or custom that permitted People TV or any People TV employee to violate Plaintiff's First Amendment rights. Further, the evidence clearly shows that the City, in the agreement with People TV, required People TV to comply with all applicable federal, state and local laws, rules, regulations, and policies and directed People TV to operate public access on a nondiscriminatory and reasonable basis. The City cannot be held liable for any violation of Plaintiff's First Amendment rights.

Jersawitz, 71 F. Supp. 2d at 1339. *Jersawitz* is consistent with *Monell*'s requirement that a direct link between municipal policy and the alleged constitutional violation exist. And here, the sole allegation against the City is the bald assertion that it was "aware that MNN has censored plaintiffs' and other cable access programming." (Am. Compl. ¶ 126). Thus, as in *Jersawitz*, Plaintiffs' claims

against the City are not legally cognizable under *Monell* and must be dismissed.[5]

B. First Amendment Claims Against MNN

MNN argues that it cannot be held liable for constitutional violations because it is a private entity. "[A]ctions of private entities can sometimes be regarded as governmental action for constitutional purposes." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995). For example, in *Lebron*, the Supreme Court held that "where . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Lebron*, 513 U.S. at 399 (addressing Amtrak). Here, the *Lebron* test is not satisfied because, among other things, the Manhattan Borough President only has the authority to appoint two of MNN's thirteen board members. *Cf. Jersawitz*, 71 F. Supp. 2d at 1338 (holding that a cable public access operator was a state actor where it was paid directly by the municipality, had a majority of its board appointed by the government, and had other obligations to the municipality not present here).

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5. Plaintiffs raise the general principle that a government entity "cannot avoid its constitutional responsibilities by delegating a public function to private parties." *Georgia v. McCollum*, 505 U.S. 42, 53, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). This is true, but that principle does not negate the pleading standard for municipal liability under *Monell*.

In addition,

> the actions of a nominally private entity are attributable to the state when: (1) the entity acts pursuant to the "coercive power" of the state or is "controlled" by the state ("the compulsion test"); (2) when the state provides "significant encouragement" to the entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies ("the joint action test"); or (3) when the entity "has been delegated a public function by the [s]tate," ("the public function test").

Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)). Plaintiffs argue that the "public function test" renders MNN a state actor because public access channels are First Amendment "public fora," and the regulation of free speech in a public forum is a traditional and exclusive public function.

Plaintiffs are correct that the regulation of free speech in a public forum is "a traditional and exclusive public function." *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002) (holding that a private entity charged with regulating speech at a public forum was a "state actor" under the "public function" test when it was regulating such speech); *see also Watchtower Bible & Tract Soc'y of New York, Inc. v. Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011) (finding, in the context of a "public function" test analysis, that "regulating access to and controlling

behavior on public streets and property is a classic government function."). Thus, if Plaintiffs have plausibly pled that MNN's administration of public access channels constitutes the administration of public fora, then they have plausibly pled that MNN was a "state actor" under the public function test.

"The classic examples of traditional public fora are streets, sidewalks, and parks, which are properties that have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hotel Employees & Rest. Employees Union, Local 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Dep't of Parks and Recreation*, 311 F.3d 534, 544-45 (2d Cir. 2002) (internal quotation marks omitted). In addition to traditional public fora, there are "designated" public fora, *i.e.* "a non-public forum that the government has opened for all types of expressive activity." *Hotel Employees*, 311 F.3d at 545-46. "[R]estrictions on speech in designated public fora are constitutional only if they are content-neutral time, place, and manner restrictions that are (1) necessary to serve a compelling state interest and (2) narrowly drawn to achieve that interest." *Hotel Employees*, 311 F.3d at 545.

The issue of whether public access channels are designated public fora has divided courts. In *All. for Cmty. Media v. F.C.C.*, the D.C. Circuit found that cable public access channels are not public fora:

> [C]able access channels are [not] so dedicated to the public that the First Amendment confers a right on the users to be free from any control

> by the owner of the cable system. . . . [T]he fact that a regulated entity is a common carrier—that under certain circumstances it must provide communications facilities to those who desire access for their own purposes does not render the entity's facilities "public forums" in the First Amendment sense and does not transform the entity's discretionary carriage decisions into decisions of the government. A heavily regulated private carrier of electricity may cut off service without having its decision scrutinized as if it were a state decision, and a private cable operator may refuse to carry indecent programming without having its decision tested by First Amendment principles applicable to the government alone.

All. for Cmty. Media v. F.C.C., 56 F.3d 105, 123, 312 U.S. App. D.C. 141 (D.C. Cir. 1995) (*"ACM"*) (internal citations omitted), *aff'd in part, rev'd in part on other grounds, Denver Area Educ. Telecom. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996).

In *Denver Area Educ. Telecom. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996), the Supreme Court reversed the *ACM* court in part, finding, among other things, that highly restrictive regulations requiring cable operators to segregate certain "patently offensive" programing violated the First Amendment. Justice Breyer's plurality opinion found it "unnecessary" and "unwise" for the Court to "definitively to decide whether or how to apply the public

forum doctrine to leased access channels." *Denver Area*, 518 U.S. at 749. In a concurring opinion, Justice Kennedy opined that public access channels are designated public fora. With references to the legislative history of the Cable Communications Policy Act of 1984 (for which the House Report characterized public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet"), as well as the nature of cable franchising arrangements with local municipalities, Justice Kennedy held that it is "clear that when a local government contracts to use private property for public expressive activity, it creates a public forum." *Denver Area*, 518 U.S. at 791-92 (Kennedy, J., concurring) (internal citations omitted).[6]

In dissent, Justice Thomas argued that public access channels are not public fora because: (1) "cable systems are not public property"; (2) "the nature of the regulatory restrictions placed on cable operators by local franchising authorities is not consistent with the kinds of governmental property interests [that] may be formally dedicated as public forums [such as sidewalks, theaters, streets and parks]"; and (3) "the assertion of government control over private property cannot justify designation

6. *See also Denver Area*, 518 U.S. at 791-92 ("Public fora do not have to be physical gathering places, nor are they limited to property owned by the government. Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands. Public access channels are analogous; they are public fora even though they operate over property to which the cable operator holds title.") (Kennedy, J., concurring).

of that property as a public forum." *Denver Area*, 518 U.S. at 829-831. "Thus, the numerous . . . obligations imposed on the cable operator in managing and operating the public access channels [demonstrate] that these channels share few, if any, of the basic characteristics of a public forum . . . public access requirements . . . are a regulatory restriction on the exercise of cable operators' editorial discretion, not a transfer of a sufficient property interest in the channels to support a designation of that property as a public forum." *Denver Area*, 518 U.S. at 831 (Thomas, J., dissenting).

"Whether courts should apply the traditional First Amendment 'forum analysis' to public access channels at all, or what type of forum courts should deem public access channels to be, remains a complex question after . . . *Denver Area*." *Egli v. Strimel*, No. 14-cv-6204, 2015 U.S. Dist. LEXIS 114312, 2015 WL 5093048, at *4 (E.D. Pa. Aug. 28, 2015). Some courts have held that public access channels are, or at least could be, public fora. *See Egli*, 2015 U.S. Dist. LEXIS 114312, 2015 WL 5093048, at *4 (holding that "at the very least [courts] have 'made clear that the First Amendment does protect the right to free expression on . . . public access cable channels'" and denying a motion to dismiss on that ground) (quoting *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 50 (D. Maine 2002)); *Jersawitz*, 71 F. Supp. 2d at 1341 ("First Amendment law and the evidence support Plaintiff's contention that People TV's cablecasting facilities are a designated public forum, available to anyone whose videotape meets the technical and content requirements established by People TV and the City"); *Brennan v. William Paterson Coll.*, 34 F. Supp. 3d 416, 428 (D.N.J.

2014) (noting that plaintiff plausibly alleged that cable public access channels were a designated public forum).[7]

Other courts have held that public access channels are not public fora. Notably, that is the consensus view of courts within the Second Circuit. For example, one judge in the Southern District of New York adopted *ACM*'s conclusion and held "that cable access channels are [not] so dedicated to the public that the First Amendment confers a right on the users to be free from any control by the owner of the cable system." *Glendora v. Cablevision Sys. Corp.*, 893 F. Supp. 264, 270 (S.D.N.Y. 1995). And another Southern District judge endorsed that conclusion in *Glendora v. Tele-Commc'ns, Inc.*, No. 96-cv-4270 (BSJ), 1996 U.S. Dist. LEXIS 18650, 1996 WL 721077, at *3 (S.D.N.Y. Dec. 13, 1996) ("[P]ublic access channels are not First Amendment 'public forums."). Similarly, an Eastern District of New York judge adopted the *Glendora* decisions, finding that "courts have routinely held that public access channels are not First Amendment 'public forums' for the purposes of state action." *Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552, 558 (E.D.N.Y. 2005).[8]

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7. *See also Britton v. City of Erie, Pa.*, 933 F. Supp. 1261, 1268 (W.D. Pa. 1995) ("A public-access cable television channel is a public forum.") (citing *Missouri Knights of the Ku Klux Klan v. City of Kansas City, Missouri*, 723 F. Supp. 1347, 1351 (W.D. Mo. 1989)).

8. *See also Griffin v. Public Access Cmty. Tel.*, No. A-10-CA-602-SS, 2010 U.S. Dist. LEXIS 101620, 2010 WL 3815797, at *4 (W.D. Tex. Sept. 27, 2010) ("[A] public access channel is not a public forum."); *Hebrew v. Houston Media Source, Inc.*, No. 09-CV-3274, 2010 U.S. Dist. LEXIS 72876, 2010 WL 2944439, at *6 (S.D. Tex. Jul. 20, 2010) ("[T]his court has found no circuit court or Supreme Court case holding that a public access local cable channel operates

In short, there is no clear precedent governing whether public access channels are public fora. The issue is certainly a close call. However, this Court agrees with those courts in this Circuit and elsewhere which have concluded that public access channels are not public fora. MNN is a private company that operates television channels, and "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." *Glendora v. Cablevision Sys. Corp.*, 893 F. Supp. 264, 269 (S.D.N.Y. 1995).[9] Moreover, in *Loce v. Time Warner Entm't Advance/Newhouse P'ship*—the

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as a public forum."); *Wilcher v. City of Akron*, 05-cv-866, 2005 U.S. Dist. LEXIS 9470, 2005 WL 1140676, at *6-8 (N.D. Ohio May 13, 2005) (holding public access channel was not a public forum where there was no "clear bond between the cable operators and local government.").

9. *See also Wilcher v. City of Akron*, 498 F.3d 516, 519 (6th Cir. 2007) ("TV service is not a traditional service of local government. A service provided by a distinct minority of local governments cannot fairly be characterized as a function traditionally reserved to the state."); *Griffin v. Pub. Access Cmty. Television*, No. A10CA602SS, 2010 U.S. Dist. LEXIS 101620, 2010 WL 3815797, at *3 (W.D. Tex. Sept. 27, 2010) ("There are no allegations in the complaint that providing services for individuals to produce public access television shows, or determining the content of a TV channel, is a traditional service of local government. Accordingly, PACT is not a state actor under this test."); *Hebrew v. Houston Media Source, Inc.*, No. 09-CV-3274, 2010 U.S. Dist. LEXIS 72876, 2010 WL 2944439, at *5 (S.D. Tex. July 20, 2010) ("Plaintiff has presented no facts concerning how Defendant's role as a conduit for the production and distribution of local television programs is a traditional service of local government, i.e., a function traditionally reserved to the State. Therefore, Defendant's actions are not fairly attributable to the State under the public function test.").

most apt Second Circuit opinion cited by either side—the Court of Appeals held:

> the fact that federal law requires a cable operator to maintain leased access channels and the fact that the cable franchise is granted by a local government are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as state action. Nor does it suffice that cable operators, in their management of leased access channels, are subject to statutory and regulatory limitations.

Loce, 191 F.3d 256, 267 (2d Cir. 1999). Though *Loce* addressed leased access—not public access—channels,[10] its holding implicitly rejects Plaintiffs' argument that public access channels are designated public fora because they are "required by government fiat." (Opp'n Br. at 12.) Indeed, the fact that New York's public access channels are required by state regulation means that aggrieved public access producers may pursue regulatory claims even if they do not have First Amendment claims. The PSC regularly holds administrative proceedings to address claims brought by public access producers seeking to challenge public access channel operators' compliance with PSC regulations requiring administration of the channels on a nondiscriminatory basis. *See, e.g.*, *Amano*

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10. "Leased access channels, as distinct from public access channels, are those the cable operator must set aside for unaffiliated programmers who pay to transmit shows of their own without the cable operator's creative assistance or editorial approval." *Denver Area*, 518 U.S. at 794-95 (Kennedy, J. concurring)

v. City of New York, 04-V-0321, 2006 N.Y. PUC LEXIS 271, 2006 WL 4470759 (N.Y.P.S.C. Aug. 30, 2006).

In short, because Plaintiffs cannot establish that MNN was operating a public forum, they fail to plead that MNN was a state actor under Section 1983. Accordingly, Plaintiffs' First Amendment claim is dismissed.

C. State-Law Claims

"Where . . . federal claims are eliminated in the early stages of litigation, courts should generally decline to exercise pendent jurisdiction over remaining state law claims." *Klein & Co. Futures v. Bd. of Trade of City of New York*, 464 F.3d 255, 262 (2d Cir. 2006); *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006). Because Plaintiffs' First Amendment claim has been dismissed, this Court declines jurisdiction over Plaintiffs' state-law claims.

CONCLUSION

Defendants' motion to dismiss is granted. The Clerk of Court is directed to terminate any pending motions and mark this case as closed.

Dated: December 13, 2016
New York, New York

SO ORDERED:

/s/ William H. Pauley III
WILLIAM H. PAULEY III
U.S.D.J.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 23, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of March, two thousand eighteen.

Docket No: 16-4155

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Plaintiffs-Appellants,

v.

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE, CITY OF NEW YORK,

Defendants-Appellees.

ORDER

Appellees, Manhattan Community Access Corporation, Daniel Coughlin, Jeanette Santiago, and Cory Bryce, filed a petition for panel rehearing, or, in the alternative, for

rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/_____

No. 17-1702

In the Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, & CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK & JESUS PAPOLETO MELENDEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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STATEMENT

New York City has chosen to designate its public access television channels as public forums: As mandated by state law, its channels are free for residents to use; the network must display residents' noncommercial videos on a first-come, first-served basis; and the cable operator can refuse to carry content only if it is material unprotected by the First Amendment. State law thus prohibits public access channels from exercising editorial control.

Most other states and municipalities take a very different approach to their public access television channels. We have uncovered just one other state (Rhode Island) with a first-come, first-served law like New York's. Throughout the rest of the country, public access channels can and do exercise editorial control. Tennessee, for example, restricts public access television to content of local interest. Los Angeles uses an editorial board to curate content.

Thus, whereas New York has chosen to designate its public access channels as public forums, most other state and local governments have not.

Petitioners do not seriously dispute that, if New York's public access channels *are* public forums, petitioners' regulation of them is state action. Indeed, that point is elementary. If a municipality delegates administration of its public sidewalks to a nonprofit corporation, regulation of those sidewalks is still bound by the First Amendment.

None of this is a surprise to petitioner Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network (MNN). Per its mission statement, MNN's *raison d'être* is to "ensure the ability of Manhattan residents to exercise their First

Amendment rights * * * on an open and equitable basis." Pet. App. 37a. In view of this acknowledged purpose, this petition—which asserts that the First Amendment does not apply at all—is nothing short of extraordinary.

In attempting to paint this case as worthy of further review, petitioners rely on a false premise. The petition rests on the contention that the decision below holds that *all* public access channels are public forums. The questions presented turn on this assertion, and it pervades the entirety of the petition.

That is fundamentally incorrect. The decision below is tethered to New York's particular legal "framework"; the court stated explicitly that it was *not* "determining whether a public access channel is necessarily a public forum" in all contexts. Pet. App. 13a. Nor could the decision bind elsewhere. The significant distinctions in state and local law—especially whether there is a first-come, first-served law—drive different results.

In sum, the particular choices state and local governments make determine whether the First Amendment applies to a public access channel. That conclusion is neither surprising nor concerning.

Petitioners, by contrast, would run roughshod over local autonomy, denying state and municipal governments the discretion to determine whether their public access channels qualify as public forums. The Court should reject petitioners' request to impose an inflexible, one-size-fits-all policy on every local government. Congress allowed for local decision making; those decisions should now be respected.

The Court should deny the petition.

A. Legal background.

This case sits at the intersection of two doctrines: the First Amendment's robust protection of public forums and the Fourteenth Amendment's state-action requirement.

1. First Amendment protections are at their zenith in public forums. Content-based speech restrictions in public forums must pass strict scrutiny. *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

There are "traditional" and "designated" public forums. Traditional public forums inherently exist; they are "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks." *United States* v. *Grace*, 461 U.S. 171, 177 (1983). The government creates a designated public forum by "intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). A designated public forum need not be a physical location. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

2. The First Amendment binds state actors. But state actors are not limited to government entities. Sometimes, "an ostensibly private organization or individual" takes an action that "may be fairly treated as that of the State itself." *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). Since the "Fourteenth Amendment is not [then] to be displaced," the Constitution applies to private action "fairly attributable" to the government. *Ibid.*

Whether private activity qualifies as state action is "necessarily [a] fact-bound inquiry." *Brentwood*, 531 U.S. at 298. An entity may be deemed a state actor when it is "coerc[ed]" or "significant[ly] encourage[ed]" by the government (*Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982) (the "compulsion test")); when it "is 'entwined with governmental policies'" (*Brentwood*, 521 U.S. at 296 (quoting *Evans* v. *Newton*, 382 U.S. 296, 299 (1966)) (the "entwinement test")); or when, despite its label, it really just is a government agency (*Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995)).

Another framework, the "public function test," is especially relevant here: "When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become * * * subject to its constitutional limitations." *Evans*, 382 U.S. at 299. The test is satisfied by functions that are "traditionally the exclusive prerogative of the State." *Jackson*, 419 U.S. at 353.

B. Public access television.

To operate in a particular region, "[c]able operators must obtain franchises from local governments to lay the cable or optical fibers needed to reach subscribers." Pet. App. 35a. When local governments extend cable franchises, they usually require cable providers to dedicate public access channels. *Ibid.*

Although federal law partially regulates these channels, they are "run in various configurations" under differing state and local regimes. Pet. 21-22. Some municipalities (like New York State) have adopted laws obligating the public access channel to air videos, without charge, on a first-come, first-served basis. Other governments have not. There are

also significant differences in who operates the public access channels: nonprofit organizations, cable companies, or even the local governments themselves may operate them. *Id.* at 22 n.5.

1. Federal law empowers and favors public access channels. When Congress established a national policy for the cable industry, it expressly gave local governments the right to require "that channel capacity be designated for public [use]." 47 U.S.C. § 531. Congress intended these channels to be an "electronic marketplace of ideas"—"the video equivalent of the speaker's soap box," "available to all, poor and wealthy alike." H.R. Rep. No. 98-934, at 30, 36 (1984).

Congress did not, however, mandate the creation of public access channels, nor did it dictate the terms on which those channels must operate. Rather, Congress left to state and local governments significant discretion as to individual policies.

2. In response to federal law, New York State has adopted one model for public access channels.

New York State law obligates local governments to establish a public access channel when issuing cable franchises. N.Y. Comp. Codes R. & Regs. tit. 16, §§ 895.1(f), 895.4(b)(1).[1] In doing so, the municipality must designate an "entity" to operate the channel. *Id.* § 895.4(c)(1).

New York State law, moreover, imposes certain requirements on the administration of public access channels. The entity operating the channel must car-

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[1] Cable operators whose systems have fewer than 36 channels are exempt from this requirement. Pet. App. 4a.

ry all noncommercial content on a "first-come, first-served, nondiscriminatory basis." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(4). And the entity must run this material "without charge to the user." *Id.* § 895.4(c)(6). See also Pet. App. 4a.

The State thus prohibits exercise of editorial control over public access content. Likewise, the cable franchisee "shall not exercise any editorial control"—*unless* the "content" is "unprotected by the First Amendment." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(8). And "[a] municipality shall not exercise any editorial control over any use by the public of a public access channel except as may be permitted by law." *Id.* § 895.4(c)(9).

State law also obligates public access channels to open significant aspects of their records to public inspection. In New York, the "entity responsible for the administration of a public access channel" must "maintain a record of the use of such channel." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(10). The entity must record "the names and addresses of all persons using or requesting the use of any such channel," and it must make this information "available for public inspection for a minimum of two years." *Ibid.*

3. In establishing cable franchises, New York City has adhered to these state-law obligations. The City obligates cable franchisees to provide public access channels; in Manhattan, it has delegated administration of those channels to petitioner MNN; it requires cable franchisees to fund MNN via extensive grants; it compels MNN to adhere to the state-law-required "first-come, first-served" and "without charge" policies; and it retains partial direct control over MNN.

First, the City requires cable franchisees to dedicate channels for public access. The City, for example, has awarded a cable franchise in Manhattan to Time Warner. Am. Compl. ¶ 30 (D. Ct. Dkt. 39).[2] In the Franchise Agreement, the City obligated Time Warner to dedicate at least four channels for public use. Franchise Agreement § 8.1.1.[3] Time Warner must carry these channels to every customer. *Id.* § 8.1.6(a).

Second, the City has delegated administration of the public access channels to petitioner MNN. Pet. App. 36a-37a. In the Franchise Agreement, the City and Time Warner agreed that the Manhattan Borough President would "designate[]" a "nonprofit corporation" as the "Community Access Organization" that operates the public access stations. Franchise Agreement § 1.18. See also *id.* at § 8.1.7 to 8.1.12.

The City has designated petitioner MNN as the "Community Access Organization" for Manhattan. MNN therefore entered into a "CAO Agreement" pursuant to the model attached to the Franchise Agreement. See Pet. App. 37a; Franchise Agreement § 8.1.8 & Appendix C; Am. Compl. ¶ 33 (identifying and describing the Community Access Organization "CAO" Grant and Use Agreement by and Between Time Warner Entertainment Company, L.P. and Manhattan Community Access Corporation d/b/a

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[2] The City has also awarded cable franchises in Manhattan to Verizon and RCN Corporation, which are subject to similar requirements. Am. Compl. ¶ 35.

[3] The Amended Complaint (at ¶¶ 30-32) identifies and describes the Cable Franchise Agreement by and Between the City of New York and Time Warner Entertainment Company, L.P., which is available at perma.cc/UTP3-JW2Q.

Manhattan Neighborhood Network ("CAO Agreement"), perma.cc/63EZ-VYHY).

The CAO Agreement recounts that "the Franchise Agreement requires Time Warner Cable to make available * * * public access channels" and to provide "support payments and Cash Grants." *Id.* at 2. It further identifies that petitioner MNN "has been designated by the Borough President as the CAO to receive such grants." *Ibid.*

Third, the City obligates MNN to adhere to the state-law requirement that it run noncommercial content without charge and on a "first-come, first-served" basis. N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(4). In particular, the CAO Agreement—which the City established in its franchise agreement with the cable operators—incorporates state law. It obligates MNN to "maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis and to the extent required by applicable law." Am. Compl. ¶ 33 (quoting CAO Agreement § 3.3.01). See also Pet. App. 37a (quoting same).

Reflective of these state-law obligations, MNN has plainly stated its "mission": to "ensure the ability of Manhattan residents to exercise their First Amendment rights * * * on an open and equitable basis." Pet. App. 37a.

Fourth, the City uses its coercive power over cable franchisees to provide for MNN's funding. As part of the franchise agreements, the City obligates cable franchisees to make multi-million dollar annual payments to MNN. See, *e.g.*, Franchise Agreement § 8.3; CAO Agreement §§ 2.1 & 2.2.

Fifth, pursuant to MNN's bylaws, the City retains partial control of MNN. Pet. App. 37a. The Manhattan Borough President selects two of MNN's directors. *Ibid.* The President additionally serves as a non-voting, *ex officio* member of MNN's board. See *MNN Staff*, Manhattan Neighborhood Network, perma.cc/A2VX-7QUF.

C. Factual background.

Respondents DeeDee Halleck and Jesus Papoleto Melendez produced video content that they aired on MNN's public access stations. Pet. App. 34a.

In December 2011, Halleck was denied entry to an MNN board meeting. Pet. App. 38a. In March 2012, respondent Melendez attended an MNN board meeting at the invitation of petitioner Coughlin, MNN's executive director. *Ibid.* Respondent Halleck came as well and began videotaping the meeting; as a result, MNN employee Iris Morales called Melendez "a traitor." *Ibid.* Later in March 2012, "Morales screamed at [respondent Melendez], threw papers and lightly struck him." *Ibid.*

In July 2012, petitioners hosted "an event to mark the opening of the El Barrio Firehouse Community Media Center." Pet. App. 5a. This was "an invitation-only formal ceremony * * * attended by many New York City politicians." *Id.* at 38a. Respondents, despite being active contributors to MNN, were not invited. *Ibid.*

Respondents stood outside the event, interviewing attendees. Pet. App. 5a-6a. Respondents attempted to interview Joseph Figueroa, Morales' boyfriend. *Id.* at 39a. After Figueroa and respondent Melendez exchanged words, Figueroa "rushed at" Melendez, attempting to strike him. *Ibid.* "An MNN

security guard intervened, grabbing Mr. Figueroa before he could strike [respondent] Melendez." Am. Compl. ¶ 79. Security nonetheless allowed Figueroa to attend the El Barrio event, while continuing to deny respondents access. *Id.* ¶ 80.

In reaction to this incident, Melendez made an on-camera comment regarding race and class:

> You know what's funny? I got to wait for my people to stop working in this building so that I can gain access to it. Do you understand what I'm saying? Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or someone kills them so that I can come and have access to the facility here. Because I am being locked out by people of color. There's irony for you.

Pet. App. 39a.

Respondents ultimately produced a video, "The 1% Visits the Barrio," that included this footage. Pet. App. 5a-6a. The film was critical of petitioner MNN, "present[ing] MNN as an organization more interested in pleasing 'the 1%' than the East Harlem community." *Id.* at 39a. Respondent Melendez denounced MNN for refusing him entry to the ceremony while it embraced well-connected city politicians. *Id.* at 38a-39a.

After initially running it, MNN later permanently banned the video from its networks. Pet. App. 6a-7a, 40a. And it suspended respondents from submitting *any* programming for airing: Halleck, for a year; and Melendez, forever. *Id.* at 40a.

The parties disagree about why. Petitioners now claim that the video was "intended to incite violence and harass[] staff." Pet. App. 40a. Respondents allege that MNN's purported justifications are pretexts for its real motive—disapproval of their video's substantive message. *Id.* at 6a-7a; Am. Compl. ¶¶ 91-92, 105-108, 110.

D. Proceedings below.

Respondents sued petitioners, asserting that petitioners violated their First Amendment by retaliating against them because of their viewpoint. Pet. App. 34a-35a.[4]

1. Recognizing the issue a "close call," the district court granted petitioners' motion to dismiss. Pet. App. 34a-53a. The court agreed that "the regulation of free speech in a public forum is 'a traditional and exclusive public function.'" *Id.* at 45a-46a. "Thus, if [respondents] have plausibly pled that MNN's administration of public access channels constitutes the administration of public fora, then they have plausibly pled that MNN was a 'state actor' under the public function test." *Id.* at 46a.

The district court, however, concluded that MNN's public access channels are not public forums. Pet. App. 46a-53a. It reasoned that "MNN is a private company that operates television channels, and the ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." *Id.* at 51a (quotation and alteration omitted).

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[4] They also sued New York City. The district court dismissed those claims (Pet. App. 43a-44a), and the court of appeals affirmed (*id.* at 17a-18a).

2. The court of appeals reversed. Pet. App. 2a-18a. Considering the particular "statutory, regulatory, and contractual framework under which this cases arises," the court concluded that the channels operated by MNN are public forums. *Id.* at 13a. Given New York's legal regime, "[a] public access channel is the electronic version of the public square." *Ibid.*

The court expressly noted that it was not "determining whether a public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square." Pet. App. 13a. Rather, it tied its conclusion to the specifics of the state regulations that require first-come, first-served access, the law that restricts the ability of channels to regulate the station content, the City's designation of MNN as the channel administrator, and the contractual provisions obligating MNN to adhere to state law. *Id.* at 4a, 13a-14a & n.7.

Because the channels are public forums, the court concluded that, in designating petitioner MNN as the regulator, the City delegated a public function to MNN. Pet. App. 14a-15a. The connection between the City and MNN "is established in this case by the fact that the Manhattan Borough President designated MNN to run the public access channels." *Ibid.* Thus, a "senior municipal official" has conferred on MNN and its employees "the authority to administer" a public forum. *Id.* at 15a.

Judge Lohier concurred. Pet. App. 19a-21a. He underscored the "the specific circumstances of this case" render "the public function test" appropriate. *Id.* at 19a. He understood the majority opinion as holding that New York City delegated to MNN the public function of administering and regulating speech in a public forum. *Id.* at 21a. Indeed, the pub-

lic access channels run programming relating "to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy." *Id.* at 20a.

Judge Jacobs concurred in part and dissented in part. Pet. App. 22a-33a. He would have concluded that MNN's channels are "entertainment facilit[ies]," not public forums. *Id.* at 25a. Since "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the state," he would have found that MNN was not a state actor. *Ibid.* Judge Jacobs did not address the requirement imposed by New York State and the City obligating MNN to air content on a "first-come, first-served" basis. See *id.* at 22a-33a.

REASONS FOR DENYING THE PETITION

Review is unwarranted: this case does not implicate the questions presented by the petition; the decision below is correct; there is no conflict among the circuits; and the lower court's decision has little practical consequence.

A. The court of appeals did not adopt a "*per se*" rule.

The petition rests on the premise that the court of appeals adopted "a *per se* rule that private operators of public access channels are state actors subject to constitutional liability." Pet i. The court of appeals, petitioners maintain, held that "public access channels are always public fora." *Id.* at 18. This sup-

posed holding is the basis of both questions presented. *Id.* at i.[5]

Petitioners are incorrect. The court of appeals did not reach that conclusion—and its holding certainly does not depend on it. In fact, the court explicitly identified that it was *not* establishing a blanket rule regarding public access channels; it did not "determin[e] whether a public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square." Pet. App. 13a. Rather, the court twice underscored that its decision was tethered to "the statutory, regulatory, and contractual framework under which this case arises." *Ibid.* See also *id.* at 13a-14a (evaluating state and municipal law and the relevant contract). And, in so concluding, the court tied its holding to "the municipal authority given to MNN in this case" and "the circumstances of this case." *Id.* at 17a.

There are several unique "statutory, regulatory, and contractual" provisions that create the relevant "framework" in New York City. Pet. App. 13a. These include:

- **First-come, first-served access:** New York law requires a public access channel to serve the public on a "first-come, first-served" basis. Pet. App. 4a.

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[5] The second question also rests on the factual assertion that New York "has no control over" petitioner MNN's "board or operations." Pet. i. But this is obviously false: as petitioners partially acknowledge (Pet. 4), the Manhattan Borough President sits on MNN's board of directors and also chooses two other directors. Pet. App. 37a; *MNN Staff*, Manhattan Neighborhood Network. Local government thus does have some direct control over MNN.

- **Free air time:** New York law provides that "[c]hannel time for [public] access programming shall be without charge to the user." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(6).
- **Noncommercial material:** New York law restricts the public access channel to noncommercial material. Pet. App. 4a.
- **A "must carry" obligation that is coextensive with the First Amendment:** New York State law obligates cable franchisees to carry public access network content *unless* the material is not protected by the First Amendment. *Id.* at 14a n.7.
- **Public reporting:** New York law requires that public access networks, including petitioner MNN, maintain publicly accessible records regarding the identities of individuals requesting airtime. N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(10).
- **Mandatory creation:** New York law *obligates* municipalities, when awarding cable franchises to operators with more than 36 channels, to create a public access station. *Id.* § 895.4(b)(1).
- **Coercive funding:** The City funds petitioner MNN—albeit indirectly—by obligating cable companies to make extensive, multimillion dollar annual payments. See Franchise Agreement § 8.3; CAO Agreement §§ 2.1 & 2.2.
- **Board control:** The City appoints two of MNN's directors, and the Manhattan Bor-

ough President has a permanent, *ex officio* seat on the board. Pet. App. 37a; *MNN Staff*, Manhattan Neighborhood Network.

- **Contract negotiation:** The City—in its cable franchise agreement—negotiated and controlled the terms of MNN's relationship with cable operators. Via that contract, the City obligates MNN to adhere to all state and local laws regarding its operations—including the public access requirement. Pet. App. 37a; Franchise Agreement § 8.1.8 & Appendix C.

The court of appeals' consideration of this "framework" (Pet. App. 13a) reflects the precise sort of context-based consideration required by the state-actor analysis. See Pet. 19-21. Taken together, these features compel the conclusion that New York City has chosen to designate its public access stations as public forums. See pp. 22-25, *infra*.

Most local governments, however, have materially different laws. Petitioners do not attempt to demonstrate that other jurisdictions replicate—much less approximate—New York's laws. The decision below, therefore, has no bearing elsewhere.

It appears that the vast majority of states lack any obligation analogous to New York's "first-come, first-served" law. See, *e.g.*, Ariz. Rev. Stat. Ann. § 9-506(D)(1); Cal. Pub. Util. Code § 5870; Conn. Agencies Regs. § 16-331a-2; Fla. Stat. Ann. § 610.109; Idaho Code Ann. § 50-3010; Ind. Code Ann. § 8-1-34-25; Iowa Code Ann. § 477A.6; Kan. Stat. Ann. § 12-2023; La. Stat. Ann. § 45:1369; Me. Rev. St. Ann. tit. 30-A, § 3010; Mo. Ann. Stat. § 67.2703; Nev. Rev. Stat. § 67.711.810; N.H. Rev. Stat. Ann. § 53-C:3-a;

N.J. Admin. Code § 14:18-14:4; N.C. Gen. Stat. Ann. § 66-357; Ohio Rev. Code Ann. § 1332.30; Okla. Stat. Ann. tit. 11, § 22-107.1; Tenn. Code Ann. § 7-59-309(a); Tex. Util. Code Ann. § 66.009; Vt. Stat. Ann. tit. 30, § 504; Va. Code Ann. § 15.2-2108.22; W. Va. Code Ann. § 24D-1-9. Minnesota expressly authorizes municipalities to determine for themselves whether public access channels must be "available for use by the general public on a first-come, first-served, nondiscriminatory basis." Minn. Stat. Ann. § 238.084. The only other state of which we are aware to have a first-come, first-served law is Rhode Island. See 815 RICR § 10-05-1.14.1.

The substantial majority of state laws thus allow local governments to structure public access channels in a way that does not designate them public forums. Governments may choose to adopt a policy that imposes substantive or editorial controls, rather than committing to air all content on a first-come, first-served basis.

A local government may, for example, restrict public access channels to only those topics with special relevance to the community. Tennessee has done so statewide: it limits public access channels to "local interest programming that may include meetings of local governing bodies, boards and commissions, community events, community sporting events," and other content defined by regional interest. Tenn. Code Ann. § 7-59-309(a)(3).

Alternatively, a government may (either itself or via a nonprofit administrator) curate content. In this way, it may treat a public access channel like a museum, public theater, or public broadcaster, airing only select content.

The Los Angeles public access station has elected to do just that. Like most states, California lacks a statewide first-come, first-served law. See Cal. Pub. Util. Code § 5870.[6] That has consequences: the Los Angeles Cable Television Access Corporation airs only "the 'Best Of' Public Access programming in the City of Los Angeles." *Public Access Guidelines*, L.A. Cable Access Corp., perma.cc/JE7W-P87H. An "advisory committee" selects the content deemed "Best Of" on "a quarterly basis." *Ibid.* Only after content is selected as "Best Of" will it then run on a "First-come, First-serve basis." *Ibid.*[7]

Creative Tucson—the Tucson public access channel—combines regional preference and curation. Like California, there is no first-come, first-served

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[6] The current structure of the Los Angeles Cable Television Access Corporation stems from California's 2006 Digital Infrastructure and Video Competition Act. See Cal. Pub. Util. Code § 5800 *et seq.* Previously, California franchise agreements often included a first-come, first-served policy. As the Los Angeles station confirms, those old policies have now been replaced. These local decisions matter.

[7] Chicago—and the Chicago Access Corporation (CAC)—also has no first-come, first-served policy. CAC may allocate channel time and space on Chicago's public access channels "on a reasonable, nondiscriminatory basis." CAC Am. Br. 18 (citing Chi., Ill. Mun. Code ch. 4-280, art. VII, § 370(1)). This, in CAC's view, affords it "significant editorial discretion" in scheduling public access programs. CAC Am. Br. 18.

Amicus Chicago Access Corporation further highlights that, unlike petitioner MNN, "[n]one of the members of its Board of Directors is appointed or controlled by any government official." CAC Am. Br. 15. But here, the Manhattan Borough President has a permanent seat on MNN's Board, and the President selects two more board members. *MNN Staff*, Manhattan Neighborhood Network.

rule in Arizona. See Ariz. Rev. Stat. Ann. § 9-506(D)(1). Tuscon's Member Manual provides that "[p]rograms of local interest will have priority over other programs." *Member Manual*, Creative Tucson, goo.gl/eFgprm. And Creative Tucson curates: "Member content is considered for broadcast on our cable channel if it meets the standards of the Creative Tucson staff and Advisory Board, which are comprised of artists and media professionals." *Ibid.* Thus, while "Creative Tucson is committed to giving each program and producer an equal and fair opportunity to showcase and participate," it will use its editorial prerogative "to provid[e] high quality, locally made programming." *Ibid.*

New York's law requiring statewide first-come, first-served access is the rare exception, not the norm. Yet this is perhaps the most critical factor supporting the conclusion that New York has designated its public access channels as public forums. As we will elaborate, New York has structured its public access channels as "generally available to a certain class of speakers"; most other local governments, however, "reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 679 (1998) (citation omitted). For purposes of the public-forum analysis, this distinction is essential.

There are other differences, too. Many other states do not obligate their public access channels to provide free access. As a result, some channels charge fees. The Houston Media Source, for example, charges to air content; an adult Houston resident must pay $225 a year for channel privileges. See

Producer Information, Houston Media Source, goo.gl /yufVkz. To air programs on Creative Tucson, an individual must become a member at a cost of $5 per month. See *Membership*, Creative Tucson, goo.gl /yaiafS.

These are just some of the different ways in which public access channels are configured. Petitioners do not disagree. They recognize that "public access channels have historically been run in various configurations and, most importantly, by a diverse set of operators." Pet. 21.

Differences in local law ultimately drive different results. New York's decision to designate a digital public forum—and the resulting decision below—says nothing at all about the treatment of public access channels in other regions, where states and municipalities have made different choices. Indeed, the Los Angeles and Tucson stations are likely not public forums. Those conclusions would be entirely consistent with the decision below.

This case does not, therefore, implicate the questions for which petitioners seek review. The actual issue is the fact-bound question of whether New York has chosen to designate its public access channels as public forums, rendering administration of those channels a public function. Review of this case would establish a rule good for New York only.

B. The decision below is correct.

Review is additionally unwarranted because the decision below is correct. Administering a public forum is a public function; petitioners do not appear to disagree. And, as we have begun to explain, New York City has purposefully designated its public access stations as public forums.

1. Administering public forums is a public function.

Petitioners do not appear to dispute that regulation of a public forum is a public function. See Pet. 15-17. Indeed, this issue is long settled.

A state actor has "very limited" authority "to restrict speech" in places that are public forums. *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2529 (2014). It typically may not impose viewpoint-based regulations, but it may enforce reasonable time, place, and manner restrictions. See *ibid.*

These crucial First Amendment protections do not dissipate when a municipality delegates regulation of the public forum to a nominally private actor. A city cannot circumvent its citizens' free-speech rights by contracting out administration of a public park or sidewalk to a private security force.

In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), the Court examined whether a company that regulated speech in a shopping district in its privately owned town became a state actor. The company, the Court held, was performing a public function: the "public * * * ha[d] an identical interest in the functioning of the community [so] that the channels of communication remain free." *Id.* at 506-507. See also *Evans*, 382 U.S. at 302 ("[T]he public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.").

The lower courts uniformly understand *Marsh* to compel the conclusion that regulation of a public forum is a quintessential public function. See, *e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011)

("Regulating access to and controlling behavior on public streets and property is a classic government function."); *United Church of Christ* v. *Gateway Econ. Dev. Corp. of Greater Cleveland*, 383 F.3d 449, 455 (6th Cir. 2004) (noting that the operation of a "public forum * * * serves as a public function"); *Lee* v. *Katz*, 276 F.3d 550, 556-557 (9th Cir. 2002) ("[T]he regulation of free speech within public forum" is "quintessentially an exclusive and traditional public function.").

The district court below agreed that "the regulation of free speech in a public forum is 'a traditional and exclusive public function.'" Pet. App. 45a-46a. And the court of appeals followed this well-established law, reasoning that "facilities or locations deemed to be public forums are usually operated by governments." *Id.* at 14a-15a. As the concurrence underscored, this was a public-function analysis. See *id.* at 21a.

2. New York has chosen to designate its public access channels as public forums.

The court of appeals correctly concluded that—in light of the decisions made by state and local government—Manhattan's public access channels are public forums.

a. Public forums come in two principal flavors: traditional and designated. *Perry Educ. Ass'n*, 460 U.S. at 45-46.[8] As to the latter, the state designates a

[8] As we have noted, the petition centers on whether public access channels are *"per se"* public forums. Whether something qualifies as a "traditional public forum" may well be a question susceptible to uniform adjudication. See, *e.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 456 (2011) ("[W]e have repeatedly referred to public streets as the archetype of a traditional public forum."). But

place "a public forum" when it "'intentionally open[s] a nontraditional forum for public discourse.'" *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 680 (1992) (quoting *Cornelius*, 473 U.S. at 802).

A designated public forum is entitled to the same constitutional protections as a traditional one. That is, "[t]he Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Perry Educ. Ass'n*, 460 U.S. at 45. See also *Minnesota Voters All.* v. *Mansky*, 138 S. Ct. 1876, 1885 (2018); *Krishna Consciousness*, 505 U.S. at 678 (Once a government has "opened" a place "for expressive activity by part or all of the public," "[r]egulation of such property is subject to the same limitations as that governing a traditional public forum.").

"[T]o ascertain whether [a government] intended to designate a place not traditionally open to assembly and debate as a public forum," the Court evaluates "the policy and practice of the government," as well as "the nature of the property and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 802. See also *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015). Against this backdrop, New York City has undoubtedly designated its public access channels as public forums.

First, New York City requires that its public access channels be "'generally available' to a class of speakers." *Arkansas Educ. Television*, 523 U.S. at

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whether a government has designated a particular place a public forum is necessarily a context-specific question.

679 (quoting *Widmar* v. *Vincent*, 454 U.S. 263, 264 (1981)). State and local law compel petitioner MNN to provide free airtime for noncommercial content to *all* individuals on a "first-come, first-served" basis. Pet. App. 4a.

Petitioners cannot assert editorial control over the content aired. This is the calling card of a public forum. The Court has underscored the critical "distinction between 'general access,' which indicates the property is a designated public forum, and 'selective access,' which indicates the property is a nonpublic forum." *Arkansas Educ. Television*, 523 U.S. at 679 (citations omitted). New York's public access channels are, by operation of state law, "general access."

But, when local governments make different choices, public access channels are "selective access." In those jurisdictions, channel administrators may make "individual, non-ministerial judgments as to which of the eligible" content airs. *Arkansas Educ. Television*, 523 U.S. at 680. Not so in New York.

Second, city and state law mandate that among the "purposes" of the public access channel is "the designation of a forum" for expressive activity. *Krishna Consciousness*, 505 U.S. at 683. As Judge Lohier explained, petitioner MNN's "programming relates to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy." Pet. App. 20a. Indeed, MNN's "mission" is to "ensure the ability of Manhattan residents to exercise their First Amendment rights * * * on an open and equitable basis." *Id.* at 37a.

Third, "the nature of the property and its compatibility with expressive activity" can further support the conclusion that the government has desig-

nated a place as a public forum. *Cornelius*, 473 U.S. at 802. See also *Widmar*, 454 U.S. at 267 n.5 (observing that a university campus "possesses many of the characteristics of a [traditional] public forum"); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (noting that the theater was "designed for * * * expressi[on]"). A public access station is no doubt compatible with expressive activity.

Fourth, New York City *created* the public access channels: New York State obligates municipalities to compel the creation of public access channels, and New York City fulfilled that obligation in the requirements it has imposed on cable franchisees in New York. See pp. 5-9, *supra*. This is the antithesis of government "inaction." *Krishna Consciousness*, 505 U.S. at 680.

This conduct, taken together, evinces New York City's unmistakable intent to designate its public access channels as public forums. While local governments are under no federal obligation to make this decision, New York City has chosen to do so.

b. There is no reason to reach a different conclusion based on some theory relating to private property. Petitioners have developed no such argument, and therefore they have waived any such contention now. In any event, it is not an issue that warrants review.

First, whatever one might think of the various opinions in *Denver Area*, the issue that generated disagreement there is not implicated here.

Denver Area concerned the constitutionality of Section 10(c), which authorized cable companies to decline to run content from public access channels. *Denver Area Educ. Telecomms. Consortium, Inc.* v.

FCC, 518 U.S. 727, 735 (1996) (plurality). *Denver Area* was thus a case about the property interest a cable company has in its *cable distribution system*. Justice Thomas in dissent focused on his view that "[c]able systems are not public property." *Denver Area*, 518 U.S. at 827 (Thomas, J., concurring in the judgment in part and dissenting in part).

But this case is not about a cable distribution system. No cable company is party to this dispute, and there is no contention that any cable company is a state actor. The issues that motivated disagreement in *Denver Area* are not present here.

Moreover, because *Denver Area* addressed a facial challenge to Section 10(c), the opinions approach the cable system as a whole, considering public access and leased access channels in broad strokes. As we have explained, that sort of analysis is misplaced here, where the fact-bound state-actor inquiry requires nuanced appreciation of the particular framework at issue. This case does not turn on any broad pronouncement of law.

Second, the interest actually at issue here—the management of the content on Manhattan's public access channels—is not "private," and may not even be "property."

Petitioners have not attempted to show that whatever interest is implicated is a "private" one. A public access channel exists solely if a state or municipal government chooses to create it. See 47 U.S.C. § 531. If a local government elects to do so, it then determines who (the government, a nonprofit, or the cable operator) will operate the channel. See Pet. 21.

State and local governments control every aspect of a public access channel: they can create it, destroy it, operate the channel itself, or delegate its management to some third party on terms that the municipality dictates. There is hardly anything "private" about this interest.

Not only that, but when New York City created the public access channel via its cable franchises, it rendered that channel a public forum. Only after so designating the channel did the City delegate its administration to petitioner MNN. Even if that delegation can be thought to have effected a property transfer—a dubious proposition—any property interest was accompanied by the plain condition that the public access channels in New York City are public forums. The City has therefore never converted any private property to a public forum.

Nor do petitioners show how there is a "property" interest at stake here. Public access channels are likely a "government program[]," which can also be a designated public forum. *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009). See also *id.* at 478 (describing a "government program"). This is a more accurate way to describe the operation of the relevant laws.

Third, even if public access channels could be thought of as private property, that does not preclude the City from designating them a public forum. In *Cornelius*, the Court held that "private property dedicated to public use" *can* be a public forum. 473 U.S. at 801. See also *Marsh*, 326 U.S. at 505-506; *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public

and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). This Court's precedents are thus incompatible with any suggestion that private property can *never* take on the attributes of a public forum.

And there obviously can be no such blanket rule: suppose, for example, a government leases private property and officially designates it a public forum. Having done so, the municipality cannot rest on the nominally private ownership of the property as a basis to resist application of the First Amendment. Moreover, "in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands." *Denver Area*, 518 U.S. at 792 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Here, New York City asserts complete domination over the public access channels—it creates them, it funds them, it decides who operates them, and it establishes the terms governing their administration. This is far more extreme an interest than a mere lease of property.

At bottom, there is no basis to conclude that the City is incapable of designating its public access channels as public forums.

C. There is no circuit conflict.

Once petitioners' caricature of the decision below is set aside, the claim of a conflict among the circuits unravels.

1. The decision below does not conflict with *Wilcher* v. *City of Akron*, 498 F.3d 516 (6th Cir. 2007).

In *Wilcher*, the court addressed whether public access stations are "a traditional service of local government." 498 F.3d at 519. This is the test for a "traditional public forum." See *Perry Educ. Ass'n*, 460 U.S. at 45-46. Providing public access television is not, the court of appeals concluded, "a function traditionally reserved to the state." *Wilcher*, 498 F.3d at 519.

The conclusion that a public access station is not a traditional public forum does not conflict with our argument or the holding below. As we have explained, petitioner MNN operates a public forum because New York City has designated it as such—not because *all* public access channels qualify. *Wilcher* did not consider whether the public access channel there was a *designated* public forum; the court specifically disclaimed addressing whether "the public access channel" is a public forum by means of "government fiat." 498 F.3d at 522 (quotation omitted).

Nor could *Wilcher* create a conflict, as the public access station there had none of the hallmarks of a designated public forum:

- **No first-come, first-served obligation:** Neither Akron nor Ohio imposed an open-access requirement, precluding editorial control.[9]

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[9] The underlying documents filed in *Wilcher* confirm that there was no first-come, first-served policy. See Dkt. 12-1, at 18-19, 5:05-cv-00866 (N.D. Ohio); Dkt. 12-2, at 3-4; Dkt. 12-5.

- **No free access obligation:** Akron permitted the operator to charge a fee for airing videos. 498 F.3d at 518.
- **Operated by cable company:** Rather than the municipality delegating operation of the public access channel to a specialized nonprofit, the cable company (Time Warner) operated the channel. *Ibid.*

Against that backdrop, there was no showing that Akron rendered its public access channel "generally available to a certain class of speakers." *Arkansas Educ. Television*, 523 U.S. at 679.

In fact, Akron expressly allowed Time Warner to establish criteria for access to the network; it could propose and implement its own regulations. *Wilcher*, 498 F.3d at 518. Rather than allow the public free, non-discriminatory, first-come, first-served access to the network, Time Warner could and did establish policies to limit its use. *Ibid.*

Wilcher merely rejects the contention that operating a public access channel is *always* a public function. 498 F.3d at 519-522. We do not disagree: different local decisions drive different results.

2. Nor does *Alliance for Community Media* v. *FCC*, 56 F.3d 105 (D.C. Cir. 1995) (*ACM*), create a conflict warranting review.

To begin with, this Court reversed *ACM* in *Denver Area*, 518 U.S. at 766. So *ACM* has no force in view of this Court's subsequent decision. Indeed, the D.C. Circuit has never relied substantively on *ACM*.

Nor does the holding below conflict with the reasoning of *ACM*. That case was not a lawsuit against a public access channel; it considered the role of the

cable franchisee in displaying content on its system. And, while *ACM* suggested that there was no state action at issue (56 F.3d at 112-115), this Court disagreed. *Denver Area*, 518 U.S. at 737 (plurality). Even petitioners' *amicus* admits that "[s]tate action indisputably was at issue." Cato Am. Br. 5.

Moreover, *ACM*'s discussion of whether public access channels are "public forums" considered whether they are like those places "traditionally used for public expression—streets and parks, for instance." 56 F.3d at 121-123. The court reasoned that not all public access channels qualify as public forums by the virtue of federal law.

Like *Wilcher*, that conclusion does not address the specific issue here. *ACM* did not have before it—and thus did not consider—the particulars of *any* local law establishing a public access channel. It certainly did not decide whether a municipality may, in circumstances like those here, *designate* a public access channel as a public forum.[10]

Nor is there any conflict with the unpublished, per curiam decision in *Glendora* v. *Sellers*, 2003 WL 22890043 (D.C. Cir. 2003). That opinion includes no analysis whatever, much less any reasoned holding in conflict with the decision below.[11]

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[10] Petitioners also cite a handful of district court cases. See Pet. 29-30. A conflict with a district court decision does not warrant this Court's review; if anything, it indicates the need for percolation. But there is no conflict: petitioners have not identified a single district court to have addressed a legal framework materially similar to that here yet nonetheless held that the administration of a public access channel is not a public function.

[11] Since operating a public forum is the public function establishing state action here, this case does not conflict with *Loce* v.

D. Petitioners misstate the implications of the holding below.

Petitioners and their *amici* offer a familiar parade of horribles that they suggest will result from the decision below. See Pet. 30-34. Two common errors pervade these claims.

First, as we have already explained, petitioners are wrong to assert that the court of appeals established a *per se* rule that governs all public access stations. See pp. 13-20, *supra*. Petitioners' analysis conflates the "traditional public forum" analysis (which often does establish bright-line rules) with the "designated public forum" doctrine (which does not). Because the decision below is specific to the particular "framework" (Pet. App. 13a) that governs New York City, it has no implications for localities that have made different choices.

Second, petitioners lose sight of the fundamental principle that only the *government* may designate a non-traditional place as a public forum. That is, for "a place not traditionally open to assembly and debate," it is a "public forum" only if "a government intended to designate" it as such. *Walker*, 135 S. Ct. at 2250 (quotation and alteration omitted). See also *Arkansas Educ. Television*, 523 U.S. at 677 ("Designated public fora * * * are created by purposeful governmental action."). A place cannot be designated a public forum absent intentional *government* action.

Time Warner Entertainment Advance/NewHouse Partnership, 191 F.3d 256 (2d Cir. 1999). *Loce* concerned "leased access" channels, which a cable operator reserves "for commercial use by unaffiliated programmers." *Id.* at 259. Those channels are not public forums, as they are not available for free public use. *Loce*'s finding of no state action is thus entirely consistent with this case; there is no "indefensible distinction." Cato Am. Br. 7.

This is why "the quad of a private college" (Pet. 17) is not a public forum.

1. Petitioners assert that the decision below imposes burdens on public access channels. Pet. 31-32. But petitioners do not—and cannot—substantiate the implicit premise that unjustified litigation arises with any frequency. As the lack of any circuit split or recurrence of the issue in the courts of appeals confirms, litigation of these issues is infrequent.

In any event, the mere prospect of a frivolous lawsuit is no reason to foreclose core constitutional rights. The canard of unjustified settlement pressure is present in virtually every form of civil litigation. But district courts are well equipped to expeditiously resolve frivolous cases—they do so every day. Petitioners merely express the preference shared by any defendant—they would simply prefer not to have to answer for their conduct in court. Petitioners' invocation of attorneys' fees (Pet. 31) is especially surprising, as fee-shifting is available only to a prevailing party.

Application of the First Amendment to petitioner MNN has no substantial effect on its day-to-day operations. A reasonable, viewpoint-neutral rule is allowed as a valid time, manner, and place restriction. See *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 323 (2002) ("Regulations of the use of a public forum that ensure the safety and convenience of the people are not inconsistent with civil liberties but are one of the means of safeguarding the good order upon which civil liberties ultimately depend." (quotation and alterations omitted)). Nothing will preclude petitioner MNN from scheduling its programming or adopting any other viewpoint-neutral rule.

The decision below has just one material effect: it precludes petitioner MNN from silencing speech with which it substantively disagrees.

The decision below does not affect networks' liability for other functions, like "provid[ing] technical training." CAC Am. Br. 19. "[A]n entity may be a State actor for some purposes but not for others." *Caviness* v. *Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 813 (9th Cir. 2010). Petitioner MNN is a state actor when it selects which programs are aired because it is then administering a public forum. It is not a state actor in other circumstances. For this reason, the decision below does not render petitioner MNN subject to any broad "collateral consequences." Pet. 32.

That said, one aspect of petitioners' argument is bizarre. Petitioners feign horror at the notion that MNN could be subject to "state sunshine" laws. Pet. 32. But petitioner MNN *is*—clearly and expressly—subject to a "state sunshine" law. Per New York law, petitioner MNN "*shall* maintain a record of the use of [its] channel[s]"; this record must "include the names and addresses of all persons using or requesting the use of [its] channel[s]"; and this "record shall be available for public inspection for a minimum of two years." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(10) (emphasis added).

New York plainly obligates petitioner MNN to make its records relating to First Amendment activities available to the public. Petitioners' argument relating to "state sunshine" laws simply underscores that this sort of obligation fits hand-in-glove with a determination by the local government that these public access channels are public forums.

2. The decision below has no effect on whether other kinds of media qualify as public forums. See Pet. 32-34.

Social media is nothing like petitioner MNN. The government did not create social media services like Twitter. The government does not impose first-come, first-served access rules on Twitter, mandate that it be free of charge, or preclude Twitter from exercising editorial control. The government certainly has not designated Twitter a public forum. The decision below thus does not compel any conclusions about the application of the First Amendment to social media.[12]

As to public radio stations, petitioners again do not show that governments have *designated* them as public forums. Indeed, petitioners identify no state or local laws that mandate free, first-come, first-served access to public radio stations.

Finally, the decision below has no relevance to Internet service providers. See Cato Am. Br. 15-16. That is because, as *amicus* admits, "Congress[] [has] recogn[ized] that Internet service providers and other online platforms should be able to provide content or restrict access to certain materials." *Id.* at 16 (cit-

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[12] In *Knight First Amendment Institute at Columbia University v. Trump*, 302 F. Supp. 3d 541, 568 (S.D.N.Y. 2018), the district court cited the decision below exactly once—for the generic conclusion, unchallenged by petitioners here, that regulating a public forum is a public function. That *Knight* did *not* consider the decision below in exploring the contours of the First Amendment's applicability to Twitter merely underscores how the considerations at issue here are differently entirely. And this case, based on this fact-specific record, is not an appropriate vehicle for shadow adjudication of unrelated litigation.

ing 47 U.S.C. § 230(c)). Precisely. The government has not designed Internet service providers as public forums.

In any event, if this case ever does prompt a subsequent court of appeals to reach the sort of fanciful results that petitioners and their *amici* fear—such as deeming Twitter, NPR, or an Internet service provider a state actor—the Court can grant review then. These fairy-tale monsters are no reason for review here.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTRODUCTION

Respondents attempt to change the subject and hide a clear and irreconcilable circuit split by mischaracterizing the Second Circuit's decision in this case *and* the decisions in the other Circuit courts. Respondents argue that the Second Circuit was correct to ignore this Court's state action tests and instead look at the forum—in this case, public access television—to determine whether it looks like a *constitutional* public forum. If it does, according to the Respondents, then its private operators are, *de facto*, part of the government. This approach is directly at odds with this Court's state action jurisprudence and with the other circuits that have considered the issue.

Moreover, Respondents seek to minimize the circuit split by manufacturing distinctions that they argue limit the holding of this case to New York's public access regime. But those differences are inaccurate, irrelevant, and most importantly, did not appear anywhere in the Second Circuit's analysis. The Second Circuit's analysis is much broader than public access channels in Manhattan, and its implications are so dangerous precisely because the decision below sweeps broadly and will apply in areas outside of the public access television context. The Second Circuit's decision will reshape all state action litigation in the Second Circuit in a way that departs dramatically from this Court's guidance and from the decisions in other Circuits.

The central issue in this case—whether the private operator of a public access channel is a state actor—is of critical importance. There is confusion and uncertainty in the lower courts in the public access television and other

new media contexts, and this Court should grant certiorari to resolve this issue and give guidance to the lower courts.

I. REVIEW IS ESSENTIAL BECAUSE THERE IS A CLEAR SPLIT OF AUTHORITY ON A FUNDAMENTAL AND CRITICAL QUESTION

All three opinions below—the Majority, the concurrence, and the dissent—recognize that the Second Circuit created a clear circuit split in this case.[1] Respondents are on their own in arguing that the circuit split does not exist. To do so, Respondents contort the decision below beyond recognition and misread the decisions in the Sixth and D.C Circuits. They also dismiss out of hand the raft of district court decisions that amplify the circuit split.

A. Respondents Completely Distort the Decision Below

The Second Circuit held that a private party was a state actor without meaningfully engaging in *any* recognizable state action analysis—despite this Court's mandate that "careful adherence to the 'state action' requirement ... preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

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1. Pet. App. 16a-17a (majority opinion); 19a (concurring opinion); 28a-31a (dissenting opinion). References to "Pet." and "Pet. App." are to Petitioner's Petition for a Writ of Certiorari, filed June 21, 2018, and its Appendices. "Opp." refers to Respondents' Brief in Opposition.

The Second Circuit skipped all of this Court's established state action tests and ignored its own prior cases where it applied those tests. Despite decades of precedent requiring it to do so, the Second Circuit ignored MNN's status as a private company, and looked solely at the *nature* of public access television. Taking its cue from Justice Kennedy's partial dissent in *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996), the Circuit then held that Manhattan's public access channels are *constitutional* public fora, and, relying on that finding, held that MNN is a state actor because any operator of a *constitutional* public forum is, *by definition*, a state actor. This conclusion—*and this analysis*—are in direct conflict with the Sixth and D.C. Circuits. The cart-before-the-horse approach to the state action question conflicts with this Court and with sister circuits around the country.

Respondents attempt to bolster the Second Circuit's misplaced tautological argument by pointing to multiple factors that the courts below never considered. They point to a list of nine criteria that they argue are "*unique*" to New York and that "compel the conclusion that New York City has chosen to designate its public access station as public forums." Opp. 14-16.[2] But these factors did not form the basis for the Second Circuit's holding, they are not unique to New York, and they do not compel a finding that a private party is a state actor.

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2. The factors are: "first-come, first-served access," "free air time," "noncommercial material," a "must-carry obligation that is coextensive with the First Amendment," "public reporting," "mandatory creation," "coercive funding," "board control," and "contract negotiation."

Several of these factors are simply co-extensive with the viewpoint- and content-neutrality required under the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521 et seq.) (the "Cable Act"), and recognized by this Court in *Denver Area*.[3] Justice Kennedy observed in *Denver Area* that public access channels are "available at low or no cost to members of the public, ***often on a first-come, first-served basis***." Pet. App. 4a (emphasis added). This is borne out in the Cable Act itself. *See* 47 U.S.C. § 531(e) (prohibiting cable operators from imposing any editorial control over public access channels, with an exception for obscenity). Several of Respondents' other factors are just wrong. For example, it is undisputed that there is *no* government *"board control"* over MNN, *i.e.*, the City can only nominate *two* of MNN's thirteen board members—by definition, not a controlling position.[4] Other factors that Respondents point to are completely irrelevant[5]

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3. These are: (a) first-come, first-served access; (b) noncommercial material; and (c) the "must-carry obligation," meaning that the broadcaster need not air material not protected by the First Amendment, *e.g.*, obscene material.

4. The Manhattan Borough President holds an ex-officio, non-voting seat on MNN's Board. There is also no "coercive funding" as MNN receives its funding in separately negotiated agreements with the cable franchisees and other private sources—***not the City of New York***. The City provides neither capital nor operating support to MNN. Nor does it provide any facilities. Indeed, this lack of control by the City is confirmed by the Second Circuit's affirming the dismissal of the City from the case.

5. The suggestion that the City of New York coerces MNN to abide by state law is risible; MNN is required to abide by state law regardless of its contract with the cable franchisee. Respondents' reliance upon MNN's colloquial use of the phrase

and the rest are hardly exclusive to New York.[6] Many municipalities have statutory schemes requiring first-come, first-served or nondiscriminatory access and have reporting requirements; and states outside of New York certainly allow municipalities to designate entities to operate public access channels.[7] Not surprisingly, more than half of all states have statutes that require public access channels to be "noncommercial."

Respondents' argument fails for another reason. If Respondents are correct that these factors are dispositive—*i.e.*, that the City "created" and "controls" MNN—this would clearly require engaging in the analysis this Court set forth in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), which is used to determine whether a private entity created pursuant

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"First Amendment rights" is a red herring. Opp. 24. Viewpoint neutrality is a hallmark of all public access channels; MNN's use of the phrase refers to its commitment to allow public access users first-come, first-serve nondiscriminatory access to the channel.

6. Respondents' discussion of the Los Angeles public access network is incomplete. While Los Angeles does have a "Best Of" public access channel, it also has West Hollywood Public Access, which schedules its programming "on a first-come-first-serve basis." *See* Submitting and Airing Programming, City of West Hollywood https://www.weho.org/city-government/communications/public-access-television/submitting-and-airing-programming.

7. For example, Massachusetts has public access channels that are free of charge for use by the public and available on a first-come, first-served, nondiscriminatory basis. *See* Guidelines for Community Television & PEG Access Policies, Foxboro Cable Access, https://www.fcatv.org/policy/#What_is_FCA; Studio FAQ's, HCAM, http://www.hcam.tv/studio-faqs.

to a governmental designation is a state actor. But Respondents, like the Second Circuit, do not even address *Lebron*; had they done so, it would have been clear that MNN is not a state actor. Pet. 6, 16 n.2. Moreover, taking Respondents' argument to its logical conclusion would also mean that Time Warner or other cable companies, wherever they operate public access channels on their systems in New York, would also be state actors, subject to First Amendment claims.[8]

Moreover, Respondents' ad hoc method of finding "state action"—looking at the forum instead of the actor—is inefficient and will lead to massive confusion in cases involving private entities. Engaging in the established state action threshold tests is far more efficient and predictable than what Respondents propose: *i.e.*, examining the nebulous, individualized factors Respondents point to, and then working backwards.[9]

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8. The same statutory and regulatory scheme that gives rise to MNN allows the cable franchisee (Time Warner) to operate public access channels at the direction of the Manhattan Borough President. N.Y. Comp. Codes R. & Regs tit. 16, §895.4(c)(1). Given the factors Respondents find dispositive, there would be no difference in Respondents' analysis if the Borough President had designated Time Warner to operate the channels.

9. New York's creation of an administrative remedy to address claims arising out of the operation of public access channels further undermines Respondents' argument that New York intended to create a public forum to be redressed by constitutional law principles. *See Assoc. of Cable Access Producers v. Pub. Serv. Comm'n*, 1 A.D.3d 761, 764 (N.Y. App. Div. 2003) (citing PSC mechanism for complaints regarding public access).

In any event, the Second Circuit did not rely on any of the items on Respondents' laundry list. Instead, it very clearly tied its holding to four specific factors:

> [W]here, as here,
>
> [F]ederal law authorizes setting aside channels for public access to be "the electronic marketplace of ideas,"
>
> [S]tate regulation requires cable operators to provide at least one public access channel,
>
> [A] municipal contract requires a cable operator to provide four such channels, and
>
> [A] municipal official has designated a private corporation to run those channels,
>
> [then] those channels are public forums.

Pet. App. 13a-14a. And, as set forth in the Petition, these specific criteria—the ones the Second Circuit actually relied on—are hardly unique to New York. Pet. 19-20; *see also* Motion for Leave and Brief for *Amicus Curiae* Chicago Access Corporation in Support of Petitioners at 16-19 & n.3, *Manhattan Cmty. Access Corp. v. Halleck*, No. 17-1702 (U.S. July 25, 2018). That is why the Second Circuit's ruling amounts to a *per se* test, inconsistent with this Court's repeated caution against such categorical analysis. Pet. 18-22 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 725-26 (1961); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001)). No amount of misdirection can avoid that conclusion.

Respondents also make a half-hearted attempt to argue that the decision below actually found that MNN was a state actor under the "public function" test—despite the fact that it explicitly did not do so. Indeed, the concurrence merely suggested that "we might ***also*** rely upon the public function test." Pet. App. 19a (emphasis added). In any event, the public function test is not satisfied under the facts of this case. Pet. 11, 17. This Court has made clear that the stringent public function inquiry has "carefully confined bound[aries]" and applies only to functions traditionally ***and*** exclusively performed by the state. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163 (1978). As Respondents' case law makes clear, this test is limited to ***specific*** functions that are traditionally performed by the government—like regulating sidewalks (*Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Sagardía De Jesús*, 634 F.3d 3, 10 (1st Cir. 2011) and *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 455 (6th Cir. 2004)) and running a town (*Marsh v. Alabama*, 326 U.S. 501 (1946)).[10] Respondents cannot dispute the fact that the operation of a public access channel is not traditionally and exclusively a function of government. As the dissent below noted, "it is fortunate for our liberty that it is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment." Pet. App. 26a.

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10. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), concerns the constitutionality of Massachusetts legislation. It directly involves government action and does not implicate the state action inquiry relating to private actors.

B. Respondents Attempt To Obscure the Clear Circuit Split

Respondents also mischaracterize the holdings in *Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir. 2007) and *Alliance for Community Media v. F.C.C.*, 56 F.3d 105 (D.C. Cir. 1995) ("*ACM*"), in which the Sixth and D.C. Circuits applied traditional state actor tests as a threshold matter in determining that private public access operators were not state actors—precisely the question presented in this case.

Respondents are correct that, in *Wilcher*, the Sixth Circuit did not decide "whether the public access channel there was a designated public forum," Opp. 29, but that is because *it did not need to do so*. Instead, on materially similar facts to those here,[11] the Sixth Circuit properly conducted the state action analysis *first* and held that the private entity operating the public access channel was not a state actor—obviating the need for further inquiry. *See Wilcher*, 498 F.3d at 518-20.

Similarly, the D.C. Circuit in *ACM* properly analyzed whether state action was present under each of this Court's state action tests. *See ACM*, 56 F.3d at 113-16. Like the Sixth Circuit, the D.C. Circuit rejected the suggestion—made by Respondents here—that "by calling ... PEG channels 'public forums' they may avoid the state action problem" because "that essential element cannot be supplied by treating access channels as public forums." *Id.* at 121-23.

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11. In *Wilcher* the Sixth Circuit decided the threshold state action question (finding no state action) on facts suggesting a much closer connection between government and the private entity, including that the private operator of the public access channel contracted directly with the city, which had the right to veto the rule changes at issue there. 498 F.3d at 518.

While *Denver Area* reversed *ACM* on other grounds, it did *not* call into question the ruling on the threshold state action analysis. 518 U.S. at 737-42. Indeed, the Second Circuit dissent observed that this portion of the *ACM* decision was left intact by this Court. *See* Pet. App. 30a.

Finally, Respondents downplay the import of the D.C. Circuit decision in *Glendora v. Sellers*, No. 03-7077, 2003 WL 22890043 (D.C. Cir. Nov. 25, 2003), calling it an "unpublished, per curiam decision." Opp. 31. This characterization ignores the fact that that the D.C. Circuit affirmed the state action holding in *ACM*, even after *Denver Area* was decided.

II. THIS CASE RAISES A CRITICAL ISSUE OF IMPORTANT PUBLIC CONCERN

Respondents attempt to trivialize the significant matters of public concern identified in the Petition by referring to them as a "parade of horribles." Opp. 32. But this dismissal ignores the fact that we stand at a moment when the very issue at the heart of this case—the interplay between private entities, nontraditional media, and the First Amendment—has been playing out in the courts, in other branches of government, and in the media itself. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 17-cv-5205, 2018 WL 2327290 (S.D.N.Y. May 23, 2018) (whether President's Twitter account was public forum); *Prager Univ. v. Google LLC*, No. 17-cv-06064, 2018 WL 1471939 (N.D. Cal. Mar. 26, 2018) (First Amendment claims against YouTube, Google); *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va. 2017) (whether municipality's Facebook page was "limited public forum").

It is critical that this Court guide the lower courts in addressing these claims. Respondents' suggestion that further "percolation" is warranted, Opp. 31, n. 10, is self-serving and wrong. The current divide in authority is intractable, creates a patchwork of inconsistency across the nation and leaves private content providers around the country (and across multiple mediums) with untenable uncertainty over whether they are part of the government.

The Second Circuit—which includes a major media hub—is very influential, and its decision could affect a broad swath of private entities with minimal connections to government, like MNN. Respondents try to distract from this concern by accusing petitioners of "los[ing] sight of the fundamental principle that only the *government* may designate a non-traditional place as a public forum." Opp. 32. But that is precisely the point: once Respondents' manufactured argument is taken apart, it is clear that New York never *designated* MNN as a public forum. And if the minimal nexus MNN has to the government is sufficient to find state action, then entities such as Time Warner, Facebook, Twitter, and National Public Radio, all of which have similar (though minimal) connections to government, should be concerned.

For example, in August 2018, Facebook, Google, Spotify, and Twitter—all private entities—removed content posted by Alex Jones. The removed content was deemed "hate speech" and banned pursuant to the rules and regulations of these private companies, but the ensuing debate has drawn heightened attention to the interplay between private companies and First Amendment rights. *See, e.g.*, Alan Feuer, *Free Speech Scholars to Alex Jones: You're Not Protected*, N.Y. Times, Aug. 7, 2018; Evan

Slavitt, *Pre-emptive strike Alex Jones' free speech is as reprehensible as he is*, Boston Herald, Aug. 11, 2018; Steve Coll, *Alex Jones, The First Amendment, and The Digital Public Square*, The New Yorker, Aug. 20, 2018; *Infowars, Alex Jones test the limits of free speech on Twitter and beyond*, CNET, Aug. 9, 2018; *see also* Floyd Abrams, *Keep The Government Out of Google Searches*, Wash. Post, Aug. 28, 2018.

Certiorari is necessary to resolve these recurring issues involved in new and changing media platforms and resolve confusion resulting from the Second Circuit's split from its sister Circuits.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in rejecting this Court's state actor tests and instead creating a *per se* rule that private operators of public access channels are state actors subject to constitutional liability.

2. Whether the Second Circuit erred in holding—contrary to the Sixth and D.C. Circuits—that private entities operating public access television stations are state actors for constitutional purposes where the state has no control over the private entity's board or operations.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan, public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs.

Consistent with its values, Cato believes that the Bill of Rights, including the First Amendment, must be preserved as a safeguard against government infringements on individual liberties, rather than used to burden private citizens in the resolution of their disagreements with other private citizens. The Second Circuit's expansive view of "state action" and "public forum" improperly treats private parties as creatures of the state.

SUMMARY OF ARGUMENT

The Petition squarely presents an important question that this Court left open more than 20 years ago: whether private operators of public access cable channels can be held liable as state actors on the ground that they oversee public forums. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, a plurality of the Court thought it

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[1] Pursuant to Rule 37.2(a), counsel for all parties received timely notice of amicus's intent to file this brief, and consented in writing. No counsel for any party authored this brief in any part; no person or entity other than amicus or its counsel made a monetary contribution to fund its preparation or submission.

"premature" to decide an integral part of that question—*i.e.*, whether public access channels are public forums subject to the First Amendment's bar on government abridgement of speech. 518 U.S. 727, 742 (1996). Because the federal statutory provisions at issue in that case undeniably were state action regulating speech, the justices in the plurality resolved the case on other grounds. *Id.* at 743. The other five justices split on the question of whether public access channels are public forums. *Id.* at 791 (Kennedy, J., concurring in part, concurring in the judgment in part, dissenting in part); *id.* at 826 (Thomas, J., concurring in the judgment in part, dissenting in part).

This case removes the obstacle that the plurality invoked in *Denver Area*. No federal statute provides the state action needed to support Respondents' claim that their First Amendment rights were violated. Instead, the lower court's decision to let such a claim go forward rested squarely on the twin holdings that public access channels are public forums, and private entities operating them are state actors. More than 20 years having passed since the *Denver Area* plurality declared the dispute "premature," the time has come for the Court to settle the matter.

Left uncorrected, the decision below will engender confusion and unnecessary risk of liability for privately owned businesses. Among other errors, the court of appeals created a spurious and untenable distinction between leased access channels and public access channels. The court reasoned that leased access channels exist "'to promote competition' with commercial channels," while "[t]he explicit purpose of public access channels was to give the public an enhanced opportunity to express its views." Pet. App.

15a. But the line separating private parties from state actors does not dissolve just because a state or municipality has an arguably altruistic reason for requiring private property owners to let others use their private property.

Public discourse best flourishes when state regulation of speech is defined to mean regulation *by* the state—not private action that the state makes possible. Placing careful limits on the state's power to regulate speech results in more free speech—the central goal of the First Amendment's protections. *See Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule."). Similarly, public discourse is fostered by a clearly defined and carefully cabined definition of state action. Only conduct "fairly attributable" to the state meets the definition. Private actors who make their own decisions about how their property is used by other speakers should not face liability as if they were vessels of the state.

The lower court's error in treating private parties as state actors could easily extend beyond cable carriers. The court's reasoning—that the designation of a private company to operate a public forum can turn the company into a state actor—logically applies to other media operators too, such as Internet service and content providers. Indeed, claimants across the country already have sought to impose constitutional liability on such providers under expansive theories of what public forums and state action encompass. This case presents an opportunity for the Court to reaffirm the need for "[c]areful adherence to the 'state action' requirement." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

ARGUMENT

I. THE QUESTIONS PRESENTED IN THE PETITION ARE RIPE FOR—AND IN NEED OF—RESOLUTION

This Court should not further delay its resolution of the questions presented in the Petition. This case is a proper vehicle for deciding whether private operators of public access cable channels are state actors who oversee public forums, an important issue left undecided 22 years ago in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Moreover, the Second Circuit's attempt to resolve the question has resulted in a spurious and untenable distinction between leased access channels and public access channels.

A. This Case Properly Presents the Question Left Undecided in *Denver Area*

The key distinction between this case and *Denver Area* is that the latter dealt with a federal statute that regulated a category of speech. Thus, the federal government was a state actor for First Amendment purposes. Here, however, Respondents challenge no state action by the federal government—only actions of Petitioners. Thus, this case squarely presents questions that the Court had no cause to reach in *Denver Area*.

Denver Area addressed First Amendment challenges to three provisions of the Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1486, §§ 10(a), 10(b), 10(c). Between 1984 and that statute's enactment in 1992, "federal law

(as had much pre-1984 state law, in respect to public access channels) prohibited cable system operators from exercising *any* editorial control over the content of any program broadcast over either leased or public access channels." *Denver Area*, 518 U.S. at 734. Congress passed the 1992 Act to "regulate the broadcasting of 'patently offensive' sex-related material on cable television." *Id.* at 732. The first provision "permit[ted]" cable operators to prohibit "patently offensive" material on leased access channels. *Id.* at 734. The second provision "require[d]" those operators that "decide[d] to permit" such programming "to segregate and to block similar programming" on leased access channels. *Id.* at 735. The third provision instructed the Federal Communications Commission ("FCC") to promulgate regulations that would "enable a cable operator" to "prohibit" "sexually explicit conduct" on public access channels. *Id.* The FCC's regulations implementing the third provision defined "sexually explicit" as content that was "patently offensive." *Id.* at 736. This Court upheld the first provision but struck down the latter two as violating the First Amendment. *Id.* at 768.

This Court's members disagreed over the need to decide whether public access channels are public forums. State action indisputably was at issue, since the "petitioners attack[ed] (as 'abridg[ing] . . . speech') a congressional statute—which, by definition, is an Act of 'Congress.'" *Denver Area*, 518 U.S. at 737 (plurality opinion) (second alteration and ellipsis in original); *see also id.* at 782 (Kennedy, J., concurring in part, concurring in the judgment in part, dissenting in part) ("The plurality at least recognizes this as state action, avoiding the mistake made by the Court of Appeals . . . ." (citation omit-

ted)). A plurality of justices thus thought it "premature to answer . . . whether public access channels are a public forum" and "whether exclusion" of certain speech "from common carriage must for all purposes be treated like exclusion from a public forum." *Id.* at 742. "Rather than decide these issues," the plurality chose to "decide the[] case[] more narrowly." *Id.* at 743.

That more narrow route was to "scrutinize" whether Congress's regulation of speech "properly addresse[d] an extremely important problem," which was "the need to protect children from exposure to patently offensive sex-related material." *Id.* The third provision did not properly address the problem because "the public/nonprofit programming control systems" already governing public access channels "would normally avoid, minimize, or eliminate any child-related problems concerning 'patently offensive' programming." *Id.* at 763–64. Thus, "th[e] third provision violate[d] the First Amendment." *Id.* at 766.

Justices Kennedy and Ginsburg agreed that the third provision violated the Constitution but would have held that "[p]ublic access channels meet the definition of a public forum." *Id.* at 791 (Kennedy, J., concurring in part, concurring in the judgment in part, dissenting in part). Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would have held that "[p]ublic access channels are not public forums" and that the third provision was constitutional. *Id.* at 831 (Thomas, J., concurring in the judgment in part, dissenting in part).

The Petition presents an opportunity to address the questions left unanswered in *Denver Area*. Unlike in that case, Respondents' claims here do not

challenge the government's regulation of any speech (such as the patently offensive sex-related material at issue in *Denver Area*). Instead, Respondents challenge the conduct of private actors, who decided (without involvement by the government) whether to host Respondents' speech. Thus, the decision below squarely reached the issue left open 22 years ago in *Denver Area*, holding that "public access TV channels in Manhattan are public forums and that [Petitioner MNN's] employees were sufficiently alleged to be state actors." Pet. App. 3a. This Court can correct those erroneous conclusions by taking up the questions that *Denver Area* did not resolve.

B. The Second Circuit Has Created a Spurious and Untenable Distinction Between Leased Access Channels and Public Access Channels

The decision below, when combined with the Second Circuit's earlier decision in *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999), creates an indefensible distinction between leased access and public access channels.

Federal law requires a private cable operator "to allocate a certain percentage of its system's capacity for leased access channels," meaning "channels for commercial use by programmers not affiliated with the cable operator." *Loce*, 191 F.3d at 265. In *Loce*, the Second Circuit considered the constitutionality of a cable operator's "Indecency Policy," which provided that "programmers who submitted indecent or obscene material for cablecast could lose their eligibility to obtain or retain leased access channel

capacity on the [operator's] system." *Id.* at 260. The cable operator had suspended the plaintiffs from submitting content on leased access channels because they violated the Indecency Policy. The plaintiffs sued the operator for alleged First Amendment violations. *Id.* at 261–62.

Like here, the primary issue in *Loce* was whether the cable operator was a state actor and therefore subject to the First Amendment's bar on abridging free speech. *Id.* at 267. The Second Circuit held that it was not: "The fact that federal law requires a cable operator to maintain leased access channels and the fact that the cable franchise is granted by a local government are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as state action." *Id.*

The decision below distinguished *Loce* on the spurious ground that it "concern[ed] leased channels, not public access channels." Pet. App. 15a. Whereas "Congress required leased channels in order 'to promote competition' with commercial channels 'in the delivery of diverse sources of video programming,'" "[t]he explicit purpose of public access channels was to give the public an enhanced opportunity to express its views." *Id.* In other words, a private party becomes a state actor (or not) depending on the precise purpose the government articulates when it requires a private party to let others use its property. If the government says it seeks to increase diversity of speech by "promot[ing] competition" between leased channels, the private entity running the cable channel is not a state actor. But if the government says it wants to increase

diversity of speech by promoting public access to non-leased channels, the private party *is* a state actor.

There is no basis in law or logic for a private party's liability as a state actor to turn on the reason the government gives for requiring the private party to open its property to use by others. As the dissenting judge explained, "[c]able operators are equally obligated to provide both 'forums.'" Pet. App. 28a (Jacobs, J., concurring in part and dissenting in part). "And in both instances the operators"—the companies that own the cable system itself—"are prohibited by law from exercising editorial control." *Id.* The different means the government uses to promote diversity of speech—*i.e.*, requiring some channels to be leased and others to be provided without charge—is a distinction without a difference.

It is also a distinction with unfair consequences. The decision below adds insult to injury by holding that *because* the government forbids a cable operator from charging fees for access to certain channels, the private entities that run those channels are saddled with the added burden of expanded civil liability.

II. THIS COURT'S PRECEDENTS COMMAND CAREFUL ADHERENCE TO THE "STATE ACTION" REQUIREMENT

The First Amendment scrupulously protects the citizenry from laws abridging the freedom of speech. When courts appropriately limit government regulation of speech, the result is more speech. Courts must be equally cautious in determining what constitutes state regulation of speech. Private parties have a right not only to speak without fear of government

interference, but also to decide who uses their property as a vehicle for expression. Limiting the definition of state action to representatives of the state also results in more speech.

A. Minimal, Clearly Defined State Regulation of Speech Results in More Speech

The First Amendment embodies the axiom that public discourse is best able to flourish when state regulation of speech is minimal and clearly defined. As Justice Douglas put it, when "the Government is the censor" of speech, then "administrative fiat, not freedom of choice, carries the day." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 153 (1973) (Douglas, J., concurring in the judgment). On the other hand, when speakers have no reason to fear liability for their speech, the result is more speech—the central goal of the First Amendment's protections. *See Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule."); *Texas v. Johnson*, 491 U.S. 397, 419 (1989) ("If there be time to expose through discussion . . . falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("[M]ore speech . . . [is] among the central goals of the Free Speech Clause.").

These principles apply to speech occurring on both public and private property. "Robust protections for just possessory rights ground and enable participation in the ecosystem of expression." Gary

Chartier, *An Ecological Theory of Free Expression* 13 (2018). This is because "[p]ossessory rights determine who will have the right to speak where and using what media." *Id.* at 21. When the state properly limits its role to protecting property rights, "[p]eople's right to control their justly acquired possessions provides a powerful safeguard against interference with expressive activity." *Id.* at 14.

By extension, when state regulation of property is minimal and clearly defined, property owners flourish. *See* Timothy Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* 17 (2006) ("People flourish only in societies where they can keep the things they earn and create a sphere of personal autonomy in which they can be themselves."). In that situation, owners make use of their property in valuable and inventive ways without fear of liability. *Id.* at 19 ("[P]rivate property . . . is enormously beneficial to society—particularly to those who are least well off—because those who own surplus capital can invest it in experimental new enterprises that raise the standard of living and create jobs.").

B. Careful Limitation of the Meaning of "State Action" to State Actors Likewise Encourages More Speech

Just as courts should zealously protect speech from state abridgment, so should courts be cautious about mischaracterizing private conduct as state abridgment of speech. Exposing private parties to civil liability for their speech-related actions discourages free speech. Such a result is antithetical to the aims of the First Amendment.

As the plurality in *Denver Area* stated, "We recognize that the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech . . . ." 518 U.S. at 737. In order to minimize "constitutional doubt," courts must consistently limit constitutionality liability to those persons meeting a narrow and carefully tailored definition of state actor. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law . . . ." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

The decision below failed to adhere carefully to the state action requirement. First, the panel majority failed to "apply any of this Court's state actor tests—the public function test, the compulsion test, or the joint action test—in concluding that MNN is a state actor." Pet. 15–16. Instead, the majority expanded the definition of state action by holding that public access channels are public forums because the federal government required that the channels be set aside, and a municipal official—the Manhattan Borough President—chose which private party would run those channels. Pet. App. 13a–14a. And although the "state action" requirement "usually" is satisfied with the *added* showing that the "public forums" are "operated by governments," the court dispensed with that need here on the ground that the same fact—a borough president's designation of MNN as operator of the channel—creates a "sufficient connection to governmental authority" for MNN and its employees "to be deemed state actors." Pet. App. 14a–15a. The majority's only authority for the first proposition—that a public

access channel is a public forum—was Justice Kennedy's concurrence in *Denver Area*. *Id.* at 13a. The majority cited no authority at all for the second proposition—that a government official's choice of the operator of a public access channel makes that operator a state actor.

This cannot even be called "adherence," let alone "*careful* adherence," to the state action requirement as outlined by this Court's precedents. This case presents the Court an opportunity to reaffirm the need for such adherence, thus preserving individual freedom and resulting in more speech.

It is no defense that expanding civil liability under 42 U.S.C. § 1983 for some private parties (*e.g.*, Petitioners) will expand the speech options for others (*e.g.*, Respondents). After all, there are countless contexts in which one could try to justify burdening one private party to give another private party greater opportunities to speak. Yet never before has this Court allowed the First Amendment to be used as a tool by some to advance their own interests at the expense of other private parties. Moreover, the same freedom of expression that allows a property owner to pick and choose among those who might use his soapbox is the same freedom that permits speech to flourish in countless other venues. Indeed, in at least some cases, a censored speaker will be able to express the same message to the same audience by other means. To quote again from Justice Douglas, "for one publisher who may suppress a fact, there are many who will print it." *CBS*, 412 U.S. at 153

(Douglas, J., concurring in the judgment).[2] The overall result is more speech.

III. THE ERRONEOUS DECISION BELOW COULD HAVE UNINTENDED FAR-REACHING CONSEQUENCES FOR OTHER PLATFORMS AND MEDIA

The lower court's erroneous formulation of the state action requirement threatens operators of other media with expanded liability. While all speakers benefit from careful judicial adherence to the state actor requirement, it is especially important for newer industries where regulatory uncertainty is often the mortal enemy of investment, development, and growth. The lack of clarity generated by the court of appeals—especially in light of where *this* court of appeals sits—could be particularly problematic for new media, including digital and web-based companies.

The Second Circuit broadly reasoned that the mere fact "that the Manhattan Borough President designated MNN to run the public access channels" creates "a sufficient connection to governmental authority" for "employees of MNN" "to be deemed state actors." Pet. App. 14a–15a. The panel also held that the same designation of MNN—in combination with the government requirement that public access channels be set aside in the first place—renders such channels public forums. *Id.* at 13a–14a. Neither of these holdings comports with the accepted frame-

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[2] That is all the more true in the 21st century, where other private and public means of access abound. *See, e.g.*, Pet. 5 (noting that Respondents' video is available on YouTube).

work for defining state actors *or* public forums. Instead, these criteria are broad enough to ensnare nearly any entity that partners with a government body to run a service made available to the public.

Internet service providers, social media websites, and other similar private companies are directly affected by the uncertainty that the decision below wreaks. Many of these companies have developed business models that rely on providing open platforms, available to all, much like the reach of public access channels. Some companies have even specifically sought to partner with municipalities to provide communities with access to the Internet. The Second Circuit's holding risks subjecting these types of businesses to the full force of liability as state actors, undermining their own right to decide which content to provide or how to operate their service.

To take one example, numerous localities throughout the United States have already contracted with private enterprises to deliver broadband and television services. *See, e.g.*, City of Lincoln, Nebraska, *Lincoln Fiber to Home Project Overview*, https://lincoln.ne.gov/city/mayor/cic/cable/pdf/project-overview.pdf; Danielle Smoot, *KentuckyWired Statewide Broadband Network Initiative Moving Forward in Eastern Kentucky and Beyond*, https://bit.ly/2L91vfM. This Court should be loath to let stand a rule that potentially unleashes Section 1983 liability on private actors as the payoff for working alongside municipal or state governments to deliver Internet access to communities in need. Nor should these providers be put to the Hobson's choice of being forced to deliver objectionable content or no content at all.

Certainly such a rule would conflict with Congress's recognition that Internet service providers and other online platforms should be able to provide content or restrict access to certain materials without fear of civil liability. *See* 47 U.S.C. § 230(c); *see also* Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230's Evolution Over Two Decades*, 18 Colum. Sci. & Tech. L. Rev 1, 2 (2016) (Under Section 230 of the Communications Decency Act, 47 U.S.C. § 230, "websites, applications, Internet service providers (ISPs), social media companies, and other online service providers should not be held liable for defamation, invasion of privacy, and virtually any other lawsuit that arises from user-provided content."). The lower court's novel conclusion—*i.e.*, that a private entity becomes a state actor if a public official is involved in selecting that entity to disseminate publicly available content—undercuts this regime.

The risk of civil liability is not some abstract hypothetical for Internet service and content providers. Litigants regularly file claims against such providers, and they seek an expansive view of the state action and public forum doctrines. *See Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 456 (E.D. Pa. 1996) (holding that AOL is not a state actor and therefore plaintiff lacked a First Amendment right to send unsolicited email via AOL); *see also Green v. Am. Online, Inc.*, 318 F.3d 465, 472 (3d Cir. 2003) (holding that AOL is not "transformed into a state actor because AOL provides a connection to the Internet on which government and taxpayer-funded websites are found, and because AOL opens its network to the public whenever an AOL member accesses the Internet and receives email or other messages

from non-members of AOL"); *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (holding that YouTube is not a public forum); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631–32 (D. Del. 2007) (rejecting argument that a search engine is a state actor or a public forum).

Until now such claims have generally failed. The Second Circuit's ruling, however, gives them new life. In *Knight First Amendment Institute at Columbia University v. Trump*, for example, plaintiffs successfully argued that portions of Twitter—a privately operated social media platform—became a public forum when used by a public official. 302 F. Supp. 3d 541, 574–75 (S.D.N.Y. 2018). The district court's analysis relied in part on the decision below to conclude that, because the parties exercising control over the Twitter account at issue were public officials, it qualified as a public forum. *Id.* at 568.

This Court recently suggested that social media is akin to "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). It is quite another thing, however, to say that private persons operating such media are state actors. The Second Circuit's decision greatly expands the circumstances in which that conclusion will follow. The Court should take this opportunity to correct the significant error made by the Second Circuit and clear up the requirements for establishing state action and a public forum.

CONCLUSION

For the foregoing reasons, and those described by the Petitioners, the Court should grant the Petition.

Respectfully submitted,

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July 25, 2018

No. 17-1702

In the
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION; DANIEL COUGHLIN; JEANETTE SANTIAGO; CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK; JESUS PAPOLETO MELENDEZ,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE AND BRIEF FOR *AMICUS CURIAE* CHICAGO ACCESS CORPORATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Amicus Chicago Access Corporation (CAC) respectfully moves for leave of Court to file the accompanying brief in support of the petition for writ of certiorari in the above-captioned case. Petitioners have consented to the filing of this brief. Due to an oversight, *amicus* provided notice to respondents six days before the filing deadline, rather than the 10 days specified in Supreme Court Rule 37.2. For that reason, respondents have declined to consent to this filing.

The principal purpose of this Court's 10-day notice requirement is to allow respondents time to seek an extension of time for their brief in opposition should they want to review and respond to arguments made by *amici* supporting the petition. Here, when *amicus* notified respondents of its intent to file, respondents already had sought and received a 30-day extension of time, which they had requested on the ground that "an *amicus* brief will be filed in this matter." Letter from Paul W. Hughes to Scott S. Harris (July 18, 2018). Accordingly, *amicus* does not believe that respondents have suffered any prejudice on account of the inadvertent delay in providing notice.

CAC is a local, community-based 501(c)(3) private foundation tasked with managing public-access television channels in Chicago, Illinois. CAC owns and operates Chicago Access Network Television (CAN TV), which was established 35 years ago to provide ordinary, work-a-day Chicagoans with an otherwise unattainable digital media platform to engage with their community. CAC is a non-

governmental, non-commercial, non-tax-supported foundation that seeks to promote and develop maximum public awareness of, usage of, and involvement in television for educational, cultural, civic, health, social service, and other non-profit purposes. To that end, CAC provides technical training, video equipment, studio facilities, television program channel time, and online hosting of unique non-commercial video content not typically accessible through commercial mass media outlets. CAC submits this *amicus* brief because the decision below threatens the viability of CAN TV and public-access channel operators around the country.

Amicus respectfully moves this Court for leave to file the accompanying brief in support of the petitioners.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

Amicus Chicago Access Corporation (CAC) is a local, community-based 501(c)(3) private foundation tasked with managing public-access television channels in Chicago, Illinois. CAC owns and operates Chicago Access Network Television (CAN TV), which was established 35 years ago to provide ordinary, work-a-day Chicagoans with an otherwise unattainable digital media platform to engage with their community. CAC is a non-governmental, non-commercial, non-tax-supported foundation that seeks to promote and develop maximum public awareness of, usage of, and involvement in television for educational, cultural, civic, health, social service, and other non-profit purposes. To that end, CAC provides technical training, video equipment, studio facilities, television program channel time, and online hosting of unique non-commercial video content not typically accessible through commercial mass media outlets. CAC submits this *amicus* brief because the decision below threatens the viability of CAN TV and public-access channel operators around the country.

SUMMARY OF ARGUMENT

The Second Circuit's decision is wrong on the merits, creates one circuit split, implicates another, and worst of all, threatens the future of public-access television. This Court should grant certiorari, clarify the correct approach to determining whether private

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

conduct can be treated as state action, and hold that private operators of public-access television channels do not engage in state action when they exercise their editorial discretion to provide a local and community-based television experience.

I. This Court has "used many different tests to identify state action." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 306 (2001) (Thomas, J., dissenting). The Second Circuit ignored every single one of them. Instead of asking whether the conduct alleged to be unconstitutional could "fairly be attributed to the State," *id.*, the Second Circuit focused on *where* that conduct occurred—*i.e.*, on whether it occurred somewhere that would be a public forum if it were operated by the government. Then, after determining (incorrectly) that a privately owned public-access channel would be a public forum, the panel majority reasoned that the defendant must be a state actor because "facilities or locations deemed to be public forums are usually operated by governments." Pet.App.14. That circular reasoning is self-evidently wrong and conflicts with decisions from the Sixth and D.C. Circuits, both of which have correctly concluded that operating a privately owned public-access channel is not state action.

II. The decision below presents another issue with which lower courts have struggled and on which members of this Court have disagreed—namely, whether private property may be designated a public forum. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), members of this Court divided on that question. Three Justices would have held that private

property can never be a public forum; two Justices would have held that public-access channels are public forums notwithstanding their private ownership; and four Justices declined to answer the question. The decision below explicitly adopts "the view expressed by Justices Kennedy and Ginsburg in *Denver Area*." Pet.App.17. Thus, to the extent there is state action here (or to the extent the public-forum question informs the state-action question), this case presents a perfect opportunity to resolve the still-unsettled issue of whether private property can ever be a public forum.

III. Certiorari is warranted not just because those questions are recurring and important, but also because the decision below threatens the viability of public-access television. As the exclusive operator of five privately owned cable television channels, CAN TV could not survive in its current form if the dozens of editorial decisions it makes every day—for example, which programs to air on which channels and at which times—were all subjected to public-forum scrutiny in federal court. And as a non-profit foundation working with a perennially modest and chronically tenuous operating budget, CAN TV could not survive in its current form if it were treated as a "state actor" for purposes of the Illinois Freedom of Information Act, Illinois Open Meetings Act, and similar laws that impose administrative burdens well beyond those with which a non-profit foundation could feasibly comply. This Court should grant certiorari to clarify this area of the law and to reject the Second Circuit's reasoning before it takes root and threatens the very existence of public-access television.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Cannot Be Reconciled With This Court's Precedents And Opens A Circuit Split Over Whether Operating A Public-Access Channel Is State Action.

A. To determine whether a defendant has violated the Constitution, a court must first decide whether the challenged action was "state action"—or, in a case filed under 42 U.S.C. §1983, was taken "under color of state law." *See Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("In cases under §1983, under color of law has consistently been treated as the same thing as the state action required under the Fourteenth Amendment."). The state-action requirement ensures "that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). This Court has formulated a variety of tests for determining whether the actions of a private party can be fairly attributed to the State. *See Brentwood*, 531 U.S. at 296. Most prominently, as explained in the petition, this Court has used a "public function" test, a "compulsion" test, and a "joint action" test. Pet.13-15.

If the challenged action can be fairly attributed to the state under one of those tests, then the court typically must determine what level of constitutional scrutiny applies. In the First Amendment context, this Court has endorsed a "forum based" approach, under which the level of constitutional scrutiny depends on the character of the property on which the government has taken the challenged action. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S.

672, 678 (1992). Thus, to evaluate whether challenged state action violates the First Amendment (directly or as incorporated against the states by the Fourteenth Amendment), a court must decide which type of forum is at issue. *See id.* at 678-83. Critically, those two inquiries—state-action analysis and forum analysis—are distinct. Before deciding whether challenged actions involve a public or nonpublic forum, "one must decide whether those actions may be attributed to the government" at all. *All. for Cmty. Media v. FCC* ("*ACM*"), 56 F.3d 105, 113 (D.C. Cir. 1995), *aff'd in part, rev'd in part sub nom. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

Faithfully applying that settled law, the Sixth and D.C. Circuits have rejected claims like the claims pressed here at the first step of the analysis, "rul[ing] that the operator of a cable system carrying a public access channel was not a state actor." Pet.App.16 n.8 (citing *Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir. 2007)); *see also ACM*, 56 F.3d 105. In *Wilcher*, the Sixth Circuit applied this Court's three established state-action tests and concluded that the defendant's new submission rules were not state action because: 1) public-access broadcasting is not "a function traditionally reserved to the state"; 2) city officials did not "coerc[e]" the defendant to change its rules; and 3) there was no "sufficiently close nexus" between the city and the defendant. *Wilcher*, 498 F.3d at 519-21; *see* Pet.24-25. Having determined that there was no state action, the Sixth Circuit found no need to address Wilcher's argument that public-access channels are public forums. *See* Br. for Appellant at 19, *Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir.

Nov. 13, 2006) (arguing that public-access channels "are designated public fora, and that any content restriction necessarily must pass strict scrutiny").

The *en banc* D.C. Circuit took the same approach and reached the same result in *ACM*. The question there was whether a cable operator's decisions about programming on a public-access channel should be treated as state action. 56 F.3d at 112-13. Like the Sixth Circuit, the D.C. Circuit applied this Court's state-action tests and found state action lacking. There was no state action under the "public function" test because "determining what programs shall be shown on a cable television system is not traditionally within the exclusive province of government." *Id.* at 113. There was no state action under the "compulsion" test because the relevant statue merely allowed—*i.e.*, did not require—cable operators to ban indecent programming. *Id.* at 113, 116. And there was no state action under the "joint action" test because there was not a "sufficiently close nexus" between the cable operator and the government. *Id.* at 115; *see* Pet.26-28.

B. The decision below stands in stark contrast to *Wilcher* and *ACM*. Expressly parting ways with the Sixth and D.C. Circuits, the panel majority concluded that MNN, a private corporation, engaged in "state action" when it temporarily suspended plaintiffs from airing programs on MNN's public-access channels. Notably, the majority did not reach that conclusion by applying any of this Court's tests for determining whether the actions of a private entity can fairly be attributed to the state. *See Brentwood*, 531 U.S. at 296. Instead, the majority skipped ahead to the forum

question and then bootstrapped its (incorrect) answer to that question into an (incorrect) answer to the state-action question. Neither that reasoning nor the result it produced can be reconciled with *Wilcher*, *ACM*, or this Court's state-action precedents.

The majority started off on the right foot, stating that "the viability of the Plaintiffs' First Amendment claim ... depends on whether MNN's actions can be deemed state action," and then citing *Brentwood* for the proposition that a private defendant "can be a state actor in several different circumstances." Pet.App.9. But instead of addressing the state-action question or applying the state-action tests outlined in *Brentwood*, the majority then turned immediately to the forum question. Indeed, the majority's very next sentence (and next eight paragraphs of analysis) were about "whether the public access channels in the pending appeal are public forums." Pet.App.10-14. Then, after focusing principally on the extent to which they are held open to the public for use, the court concluded that public-access channels are public forums because "[a] public access channel is the electronic version of the public square." Pet.App.13. *But see* Pet.App.27 (Jacobs, J., dissenting in part) ("not every well-turned phrase is good law").

The majority did not return to the state-action question until after it had decided that public-access channels are public forums. And when it did so, it still did not apply any of this Court's tests for state action. Instead, it treated the public-forum holding as all but dispositive of the state-action question. In the court's view, because "locations deemed to be public forums are usually operated by governments," and because

there was a (very tenuous) connection between MNN and the state, MNN is a state actor. Pet.App.14. To be clear, the court did not apply the "public function" test, the "compulsion" test, the "joint action" test, or any other test this Court has endorsed. Instead, the majority concluded that anything anyone does in a forum that, if operated by the government, would be a "public forum" is *ipso facto* state action, provided there is at least some ostensible connection between the actor and the government—even when that connection is not enough to satisfy any of the state-action tests. *See* Pet.App.23-26 (Jacobs, J., dissenting in part).[2]

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[2] Judge Lohier attempted to shore up the majority opinion by applying the "public function" test in his concurrence; he opined that "[a] private entity's regulation of speech in a public forum is a public function." Pet.App.19. That analysis, however, is at far too high a level of generality. The "public function" test focuses on the *specific function* the private person or entity is serving, and the question is whether that specific function is the traditional and exclusive prerogative of the State. Thus, in *Jackson v. Metro. Edison Co.*, this Court did not ask the high-level question of whether providing "essential public service[s]" was a public function, but rather asked whether "the furnishing of *utility services*" was a traditional and exclusive government function. 419 U.S. 345, 353 (1974) (emphasis added). Likewise, in *Rendell-Baker*, this Court did not ask whether public education generally was a traditional function of government; it instead rejected a state-action argument because providing special education for "maladjusted high school students" was not a traditional and exclusive province of government. 457 U.S. at 842. Instead of asking whether "regulation of speech in a public forum" is a traditional and exclusive public function, Judge Lohier should have asked the narrower question of whether operating a public-access television channel is a traditional and exclusive public function—it is not. *See* Pet.17.

That circular reasoning essentially collapses the distinct state-action and forum inquiries. In effect, the Second Circuit reasoned that because "locations deemed to be public forums are usually operated by governments," Pet.App.14, everything that looks like a public forum should be treated as if it were operated by the state. But that mistakenly assumes that it is the nature of the forum, not the nature of the party operating it, that determines whether the First Amendment applies. In fact, what makes a forum "public" for First Amendment purposes is not just that it is "devoted to assembly and debate," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), but that it is held open for those purposes *by the state*.

Indeed, the whole point of the public-forum doctrine is to assess the validity of "restrictions that *the government* seeks to place on the use of *its* property." *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678 (emphasis added). Those rules classify public property into separate categories of forums, and "the extent to which *the Government* can control access depends on the nature of the relevant forum," *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985) (emphasis added). To assume that a *private* party is subject to the same rules as a state actor simply because it operates its property like a public forum would read the state-action requirement right out of the law.

The decision below thus not only reached the wrong result, but did so through reasoning that threatens to fundamentally disrupt public-forum law. The court reached that result, moreover, in open and

acknowledged conflict with decisions from the Sixth and D.C. Circuits. *See* Pet.App.16 & n.8; Pet.App.19 (Lohier, J., concurring) (noting that "[o]ther courts have [the] view" that public-access channels are not state actors); Pet.App. 33 (Jacobs, J., dissenting in part) ("The majority conclusion that MNN is a state actor opens a split with the Sixth Circuit."). This Court should grant certiorari to resolve that conflict and reject the Second Circuit's dangerous conflation of the distinct state-action and forum inquiries.

II. The Decision Below Implicates A Division In The Lower Courts About Whether Private Property Can Be A Public Forum.

The circular manner in which the Second Circuit resolved this case is all the more problematic because it glosses over a key threshold issue that has divided lower courts and members of this Court—namely, whether *private* property can ever be a public forum. As the majority acknowledged, a public-access channel is private, not government, property. *See* Pet.App.12. "The channels belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers." *ACM*, 56 F.3d at 122. Yet in the majority's view, this concededly private property, operated by a concededly private party, nonetheless could be deemed a public forum because it is "the electronic version of the public square." Pet.App.13. This case thus presents an opportunity to resolve the unsettled and recurring question of whether private property can ever be a public forum.

In *ACM*, the *en banc* D.C. Circuit considered whether public-access channels are public forums. 56 F.3d at 121-23. Relying on several of this Court's First Amendment precedents, the *en banc* majority concluded that public-access channels could not be public forums because they are not government property: "[A] 'public forum,' or even a 'nonpublic forum,' in First Amendment parlance is government property." *Id.* at 121. "It is not ... a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee." *Id.* Because public-access channels are not owned by the government, the *en banc* majority concluded that they are not public forums. *Id.* at 123. In support of that holding, the *en banc* majority cited nearly a dozen of this Court's public-forum cases, all of which involved government property. *See id.* at 122 n.17.

When this Court reviewed the D.C. Circuit's opinion, members of this Court disagreed over whether private property could be a public forum, but ultimately left the question unresolved. *See Denver Area*, 518 U.S. 727. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, took the position that "[t]he public forum doctrine is a rule governing claims of a right of access to *public property*, and has never been thought to extend beyond property generally understood to belong to the government." *Id.* at 827 (emphasis added) (citation omitted). As Justice Thomas explained, all of this Court's "public forum cases have involved property in which the government has held at least some formal easement or

other property interest permitting the government to treat the property as its own in designating the property as a public forum." *Id.* at 828. And because "nothing in the record suggests that local franchising authorities take any formal easement or other property interest" in public-access channels, the government may not "designate that property as a public forum." *Id.*

Justice Kennedy, joined by Justice Ginsburg, took the opposite view. According to Justice Kennedy, public-access channels "are public fora even though they operate over property to which the cable operator holds title." *Id.* at 792; *see id.* ("Public fora do not have to be physical gathering places, nor are they limited to property owned by the government.") (citation omitted). Justice Kennedy pointed out that public-access channels are "[r]equired by the franchise authority as a condition of the franchise," and stated that "when a local government contracts to use private property for public expressive activity, it creates a public forum." *Id.* at 792, 794. In support of the proposition that public fora are not "limited to property owned by the government," Justice Kennedy cited *Cornelius*, 473 U.S. 788, which had stated (in dicta) that a public forum may consist of "private property dedicated to public use." *Id.* at 801.

Justice Thomas acknowledged the "dictum" from *Cornelius* but opined that it referred only "to the common practice of formally dedicating land for streets and parks when subdividing real estate for developments." *Denver Area*, 518 U.S. at 827. Those types of dedications "create enforceable public easements in the dedicated land," and "[t]o the extent

that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum." *Id.* at 827-28. Because the public does not have an enforceable easement over public-access channels, Justice Thomas concluded that the language from *Cornelius* "has no applicability here." *Id.* at 827.

The issue was not resolved in *Denver Area* because the plurality opinion declined to weigh in. The plurality found it unnecessary to decide whether public-access channels are public forums, instead resolving the case on other grounds: "We therefore think it premature to answer the broad questions that Justices Kennedy and Thomas raise in their efforts to find a definitive analogy, deciding, for example, the extent to which private property can be designated a public forum." *Id.* at 742.

The disagreement between members of this Court over whether private property can be a public forum has produced divergent results in the lower courts. For example, the Ninth Circuit has considered whether "a sidewalk constructed on private property to replace a public sidewalk ... is a public forum subject to the protections of the First Amendment." *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 939 (9th Cir. 2001). The panel majority concluded that the sidewalk was a public forum, notwithstanding its private ownership, because it was "seamlessly connected to public sidewalks at either end and intended for general public use." *Id.* at 948. In dissent, Judge Brunetti insisted that "the majority has extended the First

Amendment far beyond its intended reach and has undermined the rights of private property owners." *Id.* at 958.

The Tenth Circuit, when presented with a similar question, came up with a different answer. *See Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1252 (10th Cir. 2005). In *Utah Gospel Mission*, Salt Lake City sold a block-long section of Main Street to the Church of Latter Day Saints while reserving an easement for public access. The Church prohibited demonstrations on the property, and when a group of plaintiffs sued, the Tenth Circuit initially held that the City's easement was a public forum upon which content-based restrictions on speech could not be enforced. *See First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1132 (10th Cir. 2002). But after the City went on to sell the easement to the Church as well, the Tenth Circuit held that the property was no longer a public forum. Even though the property had historically been the quintessential public forum—indeed, it was quite literally Main Street—the complete transfer of ownership to private hands was enough to eliminate its status as a public forum. *Utah Gospel Mission*, 425 F.3d at 1255-58.

As the petition points out, the question of whether private property can be a public forum has grown in importance in recent years, as courts are increasingly being asked to consider whether privately owned internet platforms like Twitter and Facebook can ever be public forums. *See, e.g.*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018) ("[T]o potentially qualify as a

forum, the space in question must be owned or controlled by the government."); *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1011 (E.D. Ky. 2018) ("Governor Bevin's Twitter and Facebook accounts are privately owned channels of communication and are not converted to public property by the use of a public official."). This case presents an ideal opportunity to answer the unsettled and increasingly important question of whether private property can be a public forum.

III. The Decision Below Threatens The Viability of Public-Access Television.

The Second Circuit's two core holdings—that public-access channels are public forums and that the operators of public-access channels are state actors—have dramatic and deleterious consequences for public-access television. The notion that a public-access channel operator like CAC could be a state actor is immensely troubling. CAC is not the government. CAC is not a branch or extension of local, state, federal, or any other government. It is not a "sister agency" of any branch of government. None of the members of its Board of Directors is appointed or controlled by any government official. CAC is not funded by any government entity; rather, it derives its revenue from private cable operators and a video service provider (AT&T) and occasional nominal contributions from small private donations. This clear division between CAC and the government is no accident: The Chicago Municipal Code strictly forbids CAC from "[p]ermit[ting] operation of its channels to be subject to direct or indirect governmental

interference with or control of program content." Chi., Ill., Mun. Code ch. 4-280, art. VII, §370(2).

Despite the clear division between CAC and any governmental entity, CAC would likely be classified as a "state actor" under the test applied by the Second Circuit. As the petition explains, the decision below "created what is essentially a *per se* rule: public access channels are always public fora and, therefore, their private operators are state actors subject to constitutional liability." Pet.18. The only theoretical qualification to that *per se* rule was that it would apply "only" to public-access channels that are authorized by federal law, mandated by state law, and designated by a franchise authority. Pet.App.13-14. But as the petition points out, that describes almost all public-access channels in almost every state. Pet.19. For example, public-access television in Chicago is authorized by federal law, *see* 47 U.S.C. §531(b), mandated by municipal law, *see* Chi., Ill., Mun. Code ch. 4-280, art. VII, §320, and operated by CAC pursuant to a designation by the city, *id.* §310.[3]

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[3] *See also, e.g.*, Ariz. Rev. Stat. §9-506; Cal. Pub. Util. Code §5870; Centennial, Col., Mun. Code §5-3-770; Conn. Agencies Regs. §16-331a-2; Fla. Stat. Ann. §610.109; Ga. Code Ann. §36-76-8; Haw. Rev. Stat. §440G-8.3; Idaho Code Ann. §50-3010; Ind. Code §8-1-34-25; Iowa Code Ann. §477A.6; Kan. Stat. Ann. §12-2023; Paducah, Ken., Code §22-39; La. Rev. Stat. Ann. §45:1369; 30-A Me. Rev. Stat. Ann. §3010; Minn. Stat. §238.084; Mo. Ann. Stat. §67.2703; Billings, Mont., Code §7-908; Nev. Rev. Stat. §711.810; N.H. Rev. Stat. Ann. §53-C:3-a; N.J. Admin. Code §14:18-15.4; N.C. Gen. Stat. §66-357; Fargo, N.D., Code §24-0205; Ohio Rev. Code Ann. §1332.30; Okla. Stat. Ann. tit. 11, §22-107.1; 815 R.I. Code R. §010-05-1; S.C. Code Ann. §58-12-370; Tenn. Code Ann. §7-59-309; Tex. Util. Code Ann. §66.009; Vt. Stat. Ann.

The restrictions placed on the operators of public forums are severe. When operating a public forum, a state actor cannot discriminate on the basis of content and may enforce reasonable time, place, and manner restrictions only to the extent those restrictions are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983); *see Denver Area*, 518 U.S. at 782 (Kennedy, J.) ("The Constitution in general does not tolerate content-based restriction of, or discrimination against, speech.").

While those limitations make sense when applied to governmental entities regulating public streets and sidewalks, they make little sense in the context of television. CAC operates five public-access cable television channels, which are organized by the predominant type of content each one features:

- CAN TV19: Local perspectives, arts, music, sports
- CAN TV21: Live call-in programs, local politics, and education
- CAN TV27: Community news and live event coverage
- CAN TV36: Religious and inspirational programming
- CAN TV42: On-demand information on jobs, housing, health, and more with audio from non-profit radio station WDCB-FM

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tit. 30, §504; Va. Code Ann. §15.2-2108.22; Seattle, Wa., Mun. Code §21.60.060; W. Va. Code Ann. §24D-1-9.

CAC and its cablecasting department require significant editorial discretion to ensure that programs air on the proper channel and in the proper timeslot. *See* Chi., Ill., Mun. Code ch. 4-280, art. VII, §370(1) (permitting CAC to "[a]llocate ... channel space and time ... on a reasonable, nondiscriminatory basis"). By exercising its discretion to optimize programming, CAN TV enhances the viewer experience, builds its audience base, and ensures that programs will be viewed by the most receptive and appropriate members of the community. *See generally* Susan Tyler Eastman & Douglas A. Ferguson, *Media Programming: Strategies and Practices* (9th ed. 2013) (discussing the importance of cable programming to securing and retaining viewership).

Subjecting CAN TV to the strictures of public-forum analysis would cripple its ability to exercise that editorial discretion. Any decision it made about when and where to air a community-submitted program would become fodder for a federal lawsuit, where CAN TV would be forced to defend its editorial choices against strict public-forum standards. Adverse court decisions or the *in terrorem* effect of costly litigation could easily dissuade CAN TV from scheduling programs based on their content or their intended audiences, which would transform CAN TV's five carefully curated channels into unpredictable and unappealing outlets without audiences.

Similarly, CAN TV could not function without the ability to exclude certain people from accessing its facilities to produce content that undermines CAN TV's work or threatens the safety of the workplace. CAN TV does not just cablecast and stream programs;

it also provides technical training, video equipment, and studio facilities for anyone seeking to produce his or her own programs. Treating CAN TV and its facilities as public forums would undermine its ability to be reasonably selective, set standards of behavior and deportment for its public patrons, and retain discretion to bar anyone it reasonably believes may be hostile toward the organization or who seeks to leverage their physical presence within the CAN TV facility toward the end of intimidating, bullying, or shaming CAN TV staff.

Treating public-access channels as state actors for purposes of §1983 lawsuits also raises the risk that they will be treated like state actors in other contexts. Such treatment would impose unmanageable burdens and strain already-tight budgets past their breaking points. Compliance with the Illinois Open Meetings Act, for example, would be administratively burdensome and practically impossible in view of CAN TV's small staff of largely part-time hourly employees. The same is true with respect to the Illinois Freedom of Information Act, which would disrupt day-to-day business operations and siphon away already-limited resources that otherwise would be devoted to serving the public. Those types of burdens might be worth the cost when imposed on government agencies, whose employees and officers are elected or appointed (and thus must remain politically accountable), and who can draw on the state fisc to meet those demands. But treating privately owned and operated non-profits like CAC as if they were state actors would make as little sense as the Second Circuit's reasons for doing so here, and would threaten the viability of public-access television across the country.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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July 25, 2018

No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 21, 2018
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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, NO. 16-4155

Date Filed	#	Docket Text
12/14/2016	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Deedee Halleck and Jesus Papoleto Melendez, FILED. [1928906] [16-4155] [Entered: 12/15/2016 02:06 PM]
		***
12/14/2016	3	DISTRICT COURT OPINION, dated 12/13/2016, RECEIVED.[1928910] [16-4155] [Entered: 12/15/2016 02:08 PM]
12/14/2016	4	DISTRICT COURT JUDGMENT, dated 12/14/2016, RECEIVED. [1928913] [16-4155] [Entered: 12/15/2016 02:08 PM]
12/14/2016	5	ELECTRONIC INDEX, in lieu of record, FILED.[1928915] [16-4155] [Entered: 12/15/2016 02:09 PM]
		***

2/2/2017	37	**BRIEF, on behalf of Appellant Deedee Halleck and Jesus Papoleto Melendez, FILED. Service date 02/02/2017 by CM/ECF.[1960753] [16-4155] [Entered: 02/02/2017 03:32 PM]**
2/2/2017	38	**APPENDIX, volume 1 of 1, (pp. 1-160), on behalf of Appellant Deedee Halleck and Jesus Papoleto Melendez, FILED. Service date 02/02/2017 by CM/ECF.[1960768] [16-4155] [Entered: 02/02/2017 03:39 PM]**

***

3/9/2017	46	**BRIEF, on behalf of Appellee City of New York, FILED. Service date 03/09/2017 by CM/ECF. [1986263] [16-4155] [Entered: 03/09/2017 04:33 PM]**
3/9/2017	47	**BRIEF, on behalf of Appellee Manhattan Community Access Corporation, Daniel Coughlin, Jeanette Santiago, Cory Bryce and Iris Morales, FILED. Service date 03/09/2017 by CM/ECF. [1986327] [16-4155] [Entered: 03/09/2017 05:00 PM]**

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3/23/2017	57	REPLY BRIEF, on behalf of Appellant Deedee Halleck and Jesus Papoleto Melendez, FILED. Service date 03/23/2017 by CM/ECF. [1996166] [16-4155] [Entered: 03/23/2017 01:08 PM]

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6/19/2017	71	CASE, before JON, DJ, RJL, C.JJ. , HEARD.[2060979] [16-4155] [Entered: 06/19/2017 12:27 PM]
2/9/2018	85	OPINION, affirming as to the City of New York and reversing as to Manhattan Community Access Corporation and its employees, by JON, DJ, RJL, FILED.[2232824] [16-4155] [Entered: 02/09/2018 09:47 AM]
2/9/2018	86	OPINION, Concurring, by judge RJL, FILED.[2232831] [16-4155] [Entered: 02/09/2018 09:50 AM]
2/9/2018	87	OPINION, Concurring & Dissenting, by judge DJ, FILED.[2232834] [16-4155] [Entered: 02/09/2018 09:51 AM]
2/9/2018	89	CERTIFIED ORDER, dated 02/09/2018, to SDNY (NEW YORK CITY), ISSUED.[2232851] [16-4155] [Entered: 02/09/2018 09:59 AM]

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2/9/2018	92	JUDGMENT, FILED.[2233289] [16-4155] [Entered: 02/09/2018 12:40 PM]
		***
2/23/2018	96	PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellee Manhattan Community Access Corporation, Daniel Coughlin, Jeanette Santiago and Cory Bryce, FILED. Service date 02/23/2018 by CM/ECF.[2242890] [16-4155] [Entered: 02/23/2018 03:22 PM]
		***
3/23/2018	102	ORDER, petition for rehearing/ rehearing en banc denied, FILED. [2263446] [16-4155] [Entered: 03/23/2018 01:06 PM]
		***
4/13/2018	106	CERTIFIED ORDER, dated 03/26/2018, to SDNY (NEW YORK CITY), ISSUED.[2278481] [16-4155] [Entered: 04/13/2018 09:55 AM]
6/26/2018	107	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 06/25/2018, U.S. Supreme Court docket # 17-1702, RECEIVED.[2332829] [16-4155] [Entered: 06/26/2018 03:10 PM]

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10/15/2018	108	**U.S. SUPREME COURT NOTICE, dated 10/12/2018, U.S. Supreme Court docket # 17-1702, stating the petition for writ of certiorari is granted, RECEIVED.[2410328] [16-4155] [Entered: 10/15/2018 03:11 PM]**

Appendix A

RELEVANT DOCKET ENTRIES FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE) CIVIL DOCKET FOR CASE #: 1:15-CV-08141-NRB

Date Filed	#	Docket Text
10/15/2015	1	COMPLAINT against Cory Bryce, Daniel Coughlin, Manhattan Community Access Corporation, Iris Morales, Jeanette Santiago, The City Of New York,. (Filing Fee $ 400.00, Receipt Number 0208-11512597) Document filed by Deedee Halleck, Jesus Papoleto Melendez.(Perry, Robert) (Entered: 10/15/2015)
		***
12/28/2015	28	LETTER MOTION for Conference *Pre-Motion Conference* addressed to Judge William H. Pauley, III from Michael de Leeuw dated December 28, 2015. Document filed by Cory Bryce, Daniel Coughlin, Manhattan Community Access Corporation, Iris Morales, Jeanette Santiago.(Wise, Tamar) (Entered: 12/28/2015)

12/28/2015	29	LETTER MOTION for Conference *Pre-Motion Conference* addressed to Judge William H. Pauley, III from Emily K. Stitelman, Esq. dated December 28, 2015. Document filed by City of New York.(Stitelman, Emily) (Entered: 12/28/2015)

***

1/4/2016	32	LETTER addressed to Judge William H. Pauley, III from Robert T. Perry dated 01/04/2016 re: Plaintiff's Opposition to Defendants' Letters Requesting Pre-Motion Conferences. Document filed by Deedee Halleck, Jesus Papoleto Melendez.(Perry, Robert) (Entered: 01/04/2016)

***

1/8/2016	34	LETTER addressed to Judge William H. Pauley, III from Robert T. Perry dated 01/08/2016 re: Initial Pre-Trial Conference, Pre-Motion Conference. Document filed by Deedee Halleck, Jesus Papoleto Melendez. (Attachments: # 1 Exhibit Courtesy Copy of Complaint)(Perry, Robert) (Entered: 01/08/2016)

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2/1/2016	37	SCHEDULING ORDER striking 35 Motion to Intervene. The parties having appeared for a conference on January 28, 2016, the following schedule is established: 1. Plaintiffs may file an amended complaint by February 19, 2016; 2. Defendants' motion to dismiss is due by March 18, 2016; 3. Plaintiffs' opposition is due by April 18, 2016; 4. Defendants' reply is due by April 28, 2016; and 5. Oral Argument is scheduled for May 13, 2016 at 12:00 p.m. This Court also notes that it received a Motion to Intervene on January 27, 2016 (ECF No. 35), which it docketed in advance of the Initial Pretrial Conference for the benefit of the parties. However, because that motion is not properly before this Court, and does not appear to be in compliance with Fed. R. Civ. Pro. 24, the Clerk of Court is directed to strike that motion. The February 19, 2016 conference scheduled during the Initial Pretrial Conference is hereby cancelled. Any pro se litigants wishing to intervene in this case should contact the Pro Se Intake Unit of the Southern District of New York by telephone at (212) 805-0175, or by mail. (Signed by Judge William H. Pauley, III on 2/1/2016) (mro) Modified on 2/1/2016 (mro). (Entered: 02/01/2016)

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2/19/2016	39	FIRST AMENDED COMPLAINT amending 1 Complaint, against Cory Bryce, City of New York, Daniel Coughlin, Manhattan Community Access Corporation, Jeanette Santiago with JURY DEMAND. Document filed by Jesus Papoleto Melendez, Deedee Halleck. Related document: 1 Complaint, filed by Jesus Papoleto Melendez, Deedee Halleck. (Perry, Robert) (Entered: 02/19/2016)
3/18/2016	40	JOINT MOTION to Dismiss *the Amended Complaint with Prejudice.* Document filed by Cory Bryce, City of New York, Daniel Coughlin, Manhattan Community Access Corporation, Jeanette Santiago. (Wise, Tamar) (Entered: 03/18/2016)
3/18/2016	41	JOINT MEMORANDUM OF LAW in Support re: 40 JOINT MOTION to Dismiss *the Amended Complaint with Prejudice.* . Document filed by Cory Bryce, City of New York, Daniel Coughlin, Manhattan Community Access Corporation, Jeanette Santiago. (Wise, Tamar) (Entered: 03/18/2016)

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4/18/2016	43	**MEMORANDUM OF LAW in Opposition re: 40 JOINT MOTION to Dismiss *the Amended Complaint with Prejudice.*. Document filed by Deedee Halleck, Jesus Papoleto Melendez.** (Perry, Robert) (Entered: 04/18/2016)
4/28/2016	44	**REPLY MEMORANDUM OF LAW in Support re: 40 JOINT MOTION to Dismiss *the Amended Complaint with Prejudice.* . Document filed by Cory Bryce, City of New York, Daniel Coughlin, Manhattan Community Access Corporation, Jeanette Santiago.** (Wise, Tamar) (Entered: 04/28/2016)

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5/16/2016	49	**LETTER addressed to Judge William H. Pauley, III from Robert T. Perry dated 05/16/2016 re: The Court's Invitation to Address Defendants' New Argument Made in Oral Argument on Their Motions to Dismiss. Document filed by Deedee Halleck, Jesus Papoleto Melendez.**(Perry, Robert) (Entered: 05/16/2016)
5/16/2016	50	**LETTER addressed to Judge William H. Pauley, III from Tamar S. Wise**

of Cozen O'Connor dated 5/16/16 re: Response to Plaintiff's Letter 49 Letter addressed to Judge William H. Pauley, III. Document filed by Cory Bryce, Daniel Coughlin, Manhattan Community Access Corporation, Iris Morales.(Wise, Tamar) (Entered: 05/16/2016)

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8/23/2016 59 TRANSCRIPT of Proceedings re: conference held on 1/28/2016 before Judge William H. Pauley, III. Court Reporter/Transcriber: Karen Gorlaski, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/16/2016. Redacted Transcript Deadline set for 9/26/2016. Release of Transcript Restriction set for 11/25/2016.(McGuirk, Kelly) (Entered: 08/23/2016)

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12/13/2016 62 OPINION & ORDER re: 40 JOINT MOTION to Dismiss *the Amended*

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Complaint with Prejudice, filed by Manhattan Community Access Corporation, Jeanette Santiago, Daniel Coughlin, Cory Bryce, City of New York. Defendants' motion to dismiss is granted. The Clerk of Court is directed to terminate any pending motions and mark this case as closed. (Signed by Judge William H. Pauley, III on 12/13/2016) (cla) Modified on 1/23/2017 (cla). (Entered: 12/13/2016)

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12/14/2016	63	CLERK'S JUDGMENT: It is, ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion & Order dated December 13, 2016, Defendants' motion to dismiss is granted; accordingly, the case is closed. (Signed by Clerk of Court Ruby Krajick on 12/14/2016) (Attachments: # 1 Right to Appeal, # 2 Right to Appeal)(km) (Entered: 12/14/2016)

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12/14/2016	65	CORRECTED NOTICE OF APPEAL re: 64 Notice of Appeal, 63 Clerk's Judgment, 62 Memorandum & Opinion,. Document filed by Deedee

		Halleck, Jesus Papoleto Melendez. (Perry, Robert) (Entered: 12/14/2016)
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1/4/2017	66	TRANSCRIPT of Proceedings re: argument held on 5/12/2016 before Judge William H. Pauley, III. Court Reporter/Transcriber: Martha Martin, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/25/2017. Redacted Transcript Deadline set for 2/6/2017. Release of Transcript Restriction set for 4/4/2017.(Siwik, Christine) (Entered: 01/04/2017)
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2/9/2018	69	OPINION of USCA (Certified) as to 65 Corrected Notice of Appeal filed by Jesus Papoleto Melendez, Deedee Halleck. USCA Case Number 16-4155. Appeal from the December 14, 2016, judgment of the District Court for the Southern District of New York, (William H. Pauley III, District

Judge), dismissing for failure to state a valid claim allegations of First Amendment violations against the City of New York and a private corporation and its employees operating a public access television channel. *See Halleck v. City of New York*, 224 F. Supp. 3d 238 (S.D.N.Y. 2016). The Plaintiffs-Appellants contend that a public access channel is a public forum. Affirmed as to the City of New York, reversed as to Manhattan Community Access Corporation and its employees, and remanded. Judge Lohier concurs with a separate opinion; Judge Jacobs concurs in part and dissents in part with a separate opinion. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 02/09/2018. (nd) (Entered: 02/09/2018)

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3/30/2018	71	MANDATE of USCA (Certified Copy) as to 65 Corrected Notice of Appeal, filed by Jesus Papoleto Melendez, Deedee Halleck. USCA Case Number 16-4155. IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED as to the City of New York and REVERSED as to Manhattan

Community Access Corporation and its employees. The case is REMANDED for further proceedings consistent with this Court's opinion. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 03/30/2018. (Attachments: # 1 Opinion, # 2 Concurring Opinion, # 3 Concurring and Dissenting Opinion) (nd) (Entered: 03/30/2018)

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APPENDIX B — FIRST AMENDED COMPLAINT, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 19, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ECF Case
15 Civ. 8141 (WHP)

DEEDEE HALLECK and JESUS PAPOLETO MELENDEZ,

Plaintiffs,

-against-

THE CITY OF NEW YORK; MANHATTAN COMMUNITY ACCESS CORPORATION; DANIEL COUGHLIN; JEANETTE SANTIAGO; and CORY BRYCE,

Defendants.

FIRST AMENDED COMPLAINT

Jury Trial Demanded

Plaintiffs DEEDEE HALLECK and JESUS PAPOLETO MELENDEZ, by their attorney, Robert T. Perry, respectfully allege as follows:

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NATURE OF ACTION

1. Plaintiffs brings this action for preliminary and permanent injunctive relief, compensatory damages, punitive damages, and attorney's fees pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988 for violation of their civil rights under 42 U.S.C. § 1983 and the First Amendment to the United States Constitution. Plaintiffs also assert supplemental claims under New York law.

2. The City of New York ("the City") has created an electronic public forum--the cable public access channels in Manhattan -- delegating control of that forum to the Manhattan Community Access Corporation, commonly known as Manhattan Neighborhood Network ("MNN"), an entity largely funded by the City through cable television franchise fees and whose board of directors includes City employees. Exercising its delegated authority, MNN has barred plaintiff Melendez from all MNN services and facilities and censored plaintiff Halleck's programming, all because MNN officials disagree with plaintiffs' viewpoints critical of MNN's administration and management of the cable public access channels in Manhattan, in violation of plaintiffs' rights to freedom of speech under the First Amendment and Article 1, Section 8 of the New York State Constitution. MNN has further prevented members of the general public, including plaintiffs, from attending and videotaping regular meetings of MNN's board of directors, in violation of the New York Open Meetings Law.

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JURISDICTION AND VENUE

3. This action is brought pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988, and the First Amendment to the United States Constitution.

4. The Court has jurisdiction over plaintiffs' federal law claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

5. The Court has jurisdiction over plaintiffs' supplemental state law claims under 28 U.S.C. § 1367.

6. Venue is proper in the Southern District of New York under 28 U.S.C. § 1391(b) in that a substantial part of the events giving rise to plaintiffs' claims occurred in this district.

JURY DEMAND

7. Plaintiffs demand trial by jury of all issues properly triable thereby pursuant to Fed. R. Civ. P. 38(b).

PARTIES

8. Plaintiff DEEDEE HALLECK is a resident of the City, County, and State of New York.

9. Plaintiff JESUS PAPOLETO MELENDEZ is a resident of the City, County, and State of New York.

10. Defendant THE CITY OF NEW YORK ("the City") is, and was at all times relevant herein, a municipal

corporation duly organized and existing under the laws of the State of New York.

11. Defendant MANHATTAN COMMUNITY ACCESS CORPORATION, commonly known as Manhattan Neighborhood Network ("MNN"), is a not-for-profit corporation organized under the laws of the State of New York.

12. Defendant DANIEL COUGHLIN is and was MNN's Executive Director at all relevant times herein. Defendant Coughlin is being sued in his individual capacity.

13. Defendant JEANNETTE SANTIAGO is and was MNN's Programming Director at all relevant times herein. Defendant Santiago is being sued in her individual capacity,

14. Defendant CORY BRYCE is and was MNN's Manager of Production & Facilitation at all relevant times herein. Defendant Bryce is being sued in his individual capacity.

STATEMENT OF FACTS

Cable Public Access Channels

15. Cable operators use cable or optical fibers strung above ground or buried in ducts to reach the homes and businesses of their subscribers.

16. Because the construction of this physical infrastructure entails the use of public rights-of-way and often results in significant disruption of streets, alleys, and other public property, cable operators must obtain franchises from local governments.

17. Almost all cable franchise agreements require cable operators -- as a condition for easements to use the public rights-of-way -- to dedicate some channels for programming by the public ("cable public access channels") -- channels which "are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in*, 1984 U.S.C.C.A.N. 4655,4667.

18. Cable public access channels serve as a conduit for "groups and individuals who generally have not had access to the electronic media ... to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in*, 1984 U.S.C.C.A.N. 4655, 4667.

19. Cable public access channels typically are available for the free use of the public on a first-come, first-served, nondiscriminatory basis.

20. Almost from the inception of cable public access channels, cable operators have been barred from exercising editorial discretion over such channels.

21. In most communities, there is a single cable operator that provides service in a given geographical area.

22. To ensure that cable operators, even absent competition from other cable operators in the same geographical area, provide "the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), Congress enacted the Cable Communications Policy Act of 1984, Public Law No. 98-549, 98 Stat. 2780 (1984) ("the 1984 Cable Act"), which included provisions relating to cable public access channels.

23. The 1984 Cable Act ratified the pre-existing authority of local governments to require that cable operators, as a condition of cable franchise approval, provide cable public access channels. *See* 47 U.S.C. 531(a).

24. The 1984 Cable Act also prohibits cable operators generally from exercising any editorial control over any constitutionally protected expression appearing on cable public access channels. 47 U.S.C. § 531(e).

25. In regulating cable franchising by local governments in the State of New York, the New York State Public Service Commission ("PSC") has adopted certain minimum standards for cable public access channels, which the PSC defines as "channel[s] designated for noncommercial use by the public on a first-come, first-served, nondiscriminatory basis." 16 N.Y.C.R.R. 895.4(a).

26. The PSC's regulations provide that every cable television franchisee with a channel capacity of 36 or more channels shall designate at least one full-time activated channel for public access use. 16 N.Y.C.R.R. 895.4(b).

27. The PSC's regulations also provide that a municipality may designate an entity other than the cable operator to operate and administer the cable public access channels in that community. 16 N.Y.C.R.R. 895.4(c)(1).

28. The PSC's regulations further provide that the designated entity shall schedule channel time on the cable public access channels "on a first-come, first-served, nondiscriminatory basis." 16 N.Y.C.R.R. 895.4(c)(4).

29. The PSC's regulations further provide that neither the cable operator nor the municipality may exercise editorial control over cable public access channels except that a cable operator may take such measures as may be authorized by federal or state law to prohibit obscenity or other content unprotected by the First Amendment. 16 N.Y.C.R.R. 895.4(c)(8)-(9).

30. The City has awarded cable franchises in Northern and Southern Manhattan to Time Warner Entertainment Company, L.P. ("Time Warner").

31. Section 8.1.1 of the respective franchise agreements requires Time Warner to set aside certain cable channels for public access programming.

32. Section 8.1.8 of the respective franchise agreements provides that the cable public access channels in Manhattan shall fall under the jurisdiction of an "independent, not-for-profit, membership corporation" -- a Community Access Organization or CAO -- designated by the Manhattan Borough President.

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33. Section 3.3.01 of the Grant and Use Agreement by and between Time Warner and the CAO annexed to the respective franchise agreements provides that: "The CAO shall maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis and to the extent required by applicable law."

34. The Manhattan Borough President has designated the Manhattan Community Access Corporation -- commonly known as Manhattan Neighborhood Network ("MNN") -- to oversee the cable public access channels in Manhattan.

35. Incorporated in 1991, MNN is funded by the City from franchise fees collected not only from Time Warner but also from Verizon and RCN Corporation, which now are also franchised by the City to provide cable television service in Manhattan.

36. MNN's Board of Directors ("the MNN Board") is comprised of up to 13 members, two of whom are to be selected by the Manhattan Borough President and work fulltime in the latter's office.

37. In *Manhattan Neighborhood Network Policies*, MNN describes "Our Mission" as follows:

> MNN is responsible for administering public access cable TV services in Manhattan. Our purpose is to ensure the ability of Manhattan residents to exercise their First Amendment rights through moving image media to create

> opportunities for communication, education, artistic expression and other noncommercial uses of video facilities on an open and equitable basis.
>
> In providing services, we seek to involve the diverse racial, ethnic and geographic communities of Manhattan in the electronic communication of their varied interest, needs, concerns and identities.

Manhattan Neighborhood Network Policies, *available at* http://www.mnn.org/policies (updated May 2015).

38. While MNN's principal offices and studio are at 553 West 59th Street in Manhattan, MNN opened the MNN El Barrio Firehouse Community Media Center ("the El Barrio Firehouse")-- on property once occupied by a real firehouse and leased by MNN from the City for nominal rent -- in East Harlem in early 2012.

Plaintiffs' Suspension From Manhattan's Cable Public Access Channels

39. Plaintiff Halleck has been involved in cable public access programming in Manhattan since the 1970's, not only as a producer but also as an advocate of such programming.

40. Plaintiff Melendez has been involved in cable public access programming in Manhattan since the mid-1990's, principally through assisting youth and senior citizens at the University Settlement in East Harlem in producing such programming.

41. On the evening of December 14, 2011, plaintiff Halleck, Kym Clark, Carlos Pareja, and Betty Yu came to the El Barrio Firehouse to speak at the regular quarterly meeting of the MNN Board, which was being held that evening at the Firehouse.

42. Plaintiff Halleck, Ms. Clark, Mr. Pareja, and Ms. Yu sought to urge the MNN Board to reinstate a community media grant program and a youth program which had recently been discontinued.

43. Upon learning that plaintiff Halleck, Ms. Clark, Mr. Pareja, and Ms. Yu were present, defendant Coughlin approached them and said that the MNN Board meeting was closed.

44. When plaintiff Halleck observed that MNN's by-laws required all regular MNN Board meetings to be open to the public, defendant Coughlin told her that the by-laws had been changed, which was not true.

45. In early January 2012, plaintiff Melendez accepted an invitation from Iris Morales, MNN's new Director of the El Barrio Firehouse, to join MNN's Community Leadership Program.

46. The Community Leadership Program was ostensibly designed to provide individuals of artistic merit and community commitment with training in field and studio production.

47. Those invited to participate in the Community Leadership Program, including plaintiff Melendez, were

to meet for training sessions on Wednesday evening for 10 consecutive weeks.

48. On February 28, 2012, plaintiff Halleck e-mailed Norris Chumley, a member of the MNN Board, requesting that she, plaintiff Melendez, and Kym Clark be allowed to attend and speak at the regular quarterly meeting of the MNN Board in March 2012.

49. On March 10, 2012, defendant Coughlin replied to plaintiff Halleck by e-mail, inviting plaintiffs Halleck and Melendez and Ms. Clark to attend the regular quarterly meeting of the MNN Board at the El Barrio Firehouse on Wednesday evening, March 14, 2012.

50. On Wednesday evening, March 14, 2012, at about 7:00 p.m., the MNN Board held a regular quarterly meeting at the El Barrio Firehouse.

51. Pursuant to the invitation extended by defendant Coughlin (*see* ¶ 49 *supra*), plaintiffs Halleck and Melendez and Ms. Clark attended the regular quarterly meeting of the MNN Board on Wednesday evening, March 14, 2012.

52. Plaintiff Halleck brought a video camera to videotape the meeting.

53. The Community Leadership Program also held its weekly training session that evening, Wednesday, March 14, 2012, at the El Barrio Firehouse.

54. Plaintiff Melendez initially went to the training session but stepped out to attend the meeting of the MNN Board downstairs.

55. As soon as plaintiff Halleck began videotaping, the MNN Board, at defendant Coughlin's direction or with his approval, abruptly ended the meeting and adjourned.

56. Plaintiff Melendez then returned to the training session upstairs.

57. Shortly thereafter, Ms. Morales came into the training session and told plaintiff Melendez that she wanted to speak with him.

58. Plaintiff Melendez followed Ms. Morales out of the El Barrio Firehouse.

59. On the sidewalk outside the El Barrio Firehouse, Ms. Morales screamed at plaintiff Melendez, calling him "a traitor."

60. By the time that Ms. Morales finished her tirade, the training session was over.

61. Plaintiff Melendez went back inside the El Barrio Firehouse, picked up his belongings, and left.

62. The following Wednesday evening, March 21, 2012, plaintiff arrived at the El Barrio Firehouse to attend the Community Leadership Program's weekly training session only to learn that he was barred from participation.

63. The next day, Thursday, March 22, 2012, plaintiff Melendez called Ms. Morales for a clarification of his

status in the Community Leadership Program and was told to come to the El Barrio Firehouse to meet with Ms. Morales the following day.

64. On Friday afternoon, March 23, 2012, plaintiff Melendez met with Ms. Morales in a studio at the El Barrio Firehouse.

65. Ms. Morales screamed at plaintiff Melendez, threw crumpled papers at him, and at one point struck him, though not with great force.

66. Using strong language but without raising his voice, plaintiff Melendez told Ms. Morales that she was acting inappropriately.

67. Hearing Ms. Morales's screams, an MNN security guard entered the office.

68. Plaintiff Melendez got up and left the El Barrio Firehouse.

69. By letter dated April 12, 2012, defendant Coughlin informed plaintiff Melendez that Ms. Morales had withdrawn her invitation to him to participate in the Community Leadership Program "due to conduct incompatible with the program's team-building and open communications values."

70. Defendant Coughlin stated -- falsely -- that "your confrontational, disrespectful and loud behavior on March 23 necessitated an intervention from MNN staff alarmed about Ms. Morales's safety."

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71. On information and belief, Ms. Morales withdrew the invitation to plaintiff Melendez to participate in the Community Leadership Program, at defendant Coughlin's direction or with his approval, because plaintiff Melendez had attended the regular quarterly meeting of the MNN Board on Wednesday evening, March 14, 2012 with plaintiff Halleck. (*See* ¶¶ 51-55 *supra*.)

72. Nearly four months later, on July 19, 2012, MNN held an invitation-only formal opening of the El Barrio Firehouse.

73. MNN invited, among others, a select group of public officials, including then Manhattan Borough President Scott Stringer and then City Council Member Melissa Mark-Viverito, to the opening.

74. Even though they were not invited to the opening, plaintiffs stood outside the entrance to the El Barrio Firehouse during the opening, interviewing invitees on videotape as they arrived.

75. When Jose Angel Figueroa, Ms. Morales's boyfriend and a participant in MNN's Community Leadership Program, arrived for the opening, plaintiff Halleck asked him -- politely -- "Would you like to say something about public access?"

76. Mr. Figueroa angrily replied to plaintiff Halleck, "Don't fuck with me."

77. Plaintiff Melendez responded in kind, "Hey fuck you."

78. Mr. Figueroa then rushed towards plaintiff Melendez to assault him.

79. An MNN security guard intervened, grabbing Mr. Figueroa before he could strike plaintiff Melendez.

80. Despite his attempted assault and battery on plaintiff Melendez, Mr. Figueroa was allowed to enter the El Barrio Firehouse to attend the opening.

81. A short while later, plaintiff Melendez stated to plaintiff Halleck as she videotaped him in front of the El Barrio Firehouse:

> You know what's funny. I had to wait for my people to stop working in this building so that I can gain access to it. Do you understand what I'm saying? Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or someone kills them so that I can come and have access to the facility here. Because I am being locked out by people of color. There's irony for you.

82. In late August or early September 2012, plaintiff Halleck submitted two programs to MNN's programming department for airing as "specials" on MNN's cable public access channels, including a program entitled "The 1% Visits the Barrio."

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83. Based on the video footage taken by plaintiff Halleck in front of the El Barrio Firehouse on July 19,2012, "The 1% Visits the Barrio" presented plaintiffs' view of MNN as more interested in pleasing "the 1%" than addressing the community programming needs of those living in East Harlem, including plaintiff Melendez, notwithstanding that MNN calls itself the Manhattan *Neighborhood* Network.

84. "The 1% Visits the Barrio" aired on MNN's cable public access channels at 8:30 a.m. on October 2, 2012.

85. By letter dated October 11, 2012 but not mailed until later, defendant Santiago, MNN's Programming Director, informed plaintiff Halleck that she was suspended for three months from airing programs over MNN's cable public access channels.

86. Defendant Santiago stated that "The 1% Visits the Barrio" program airing on October 2, 2012 violated MNN program content restrictions barring "participation in harassment or aggravated threat toward staff and/or other producers."

87. Defendant Santiago asserted, in particular, that plaintiff Melendez's statement in "The 1% Visits the Barrio" program -- that "People of color work in this building and I have to wait until people get fired, they retire or someone kills them so that I can come and have access to the facility here." -- incited violence and harassment towards staff and was in direct violation of MNN's "zero tolerance on harassment."

88. Defendant Santiago's assertion was false, as plaintiff Melendez, in making the above statement in "The 1% Visits the Barrio" program, neither intended to incite violence or harassment towards MNN staff nor did the statement have that effect.

89. Plaintiff Halleck did not receive the letter until October 24, 2012.

90. By letter to defendant Coughlin dated October 25, 2012, plaintiff Halleck appealed the decision to suspend her for three months from airing programs over MNN's cable public access channels.

91. Plaintiff Halleck protested that defendant Santiago, in her October 11, 2012 letter, had selectively quoted plaintiff Melendez's statement in "The 1% Visits the Barrio" program and taken the statement out of context.

92. Plaintiff Halleck pointed out that plaintiff Melendez was merely expressing his despair at being barred from use of a neighborhood facility and denied that the statement incited violence or threatened anyone.

93. Plaintiff Halleck suggested that the real reason for the suspension was because she had questioned the transparency and accountability of MNN's management.

94. By letter to plaintiff Halleck dated November 19, 2012, defendant Coughlin denied plaintiff Halleck's appeal of her three-month suspension from airing programs over MNN's public access channels.

95. Disregarding plaintiff Melendez's full statement in "The 1% Visits the Barrio" program (*see* ¶ 81 *supra*), defendant Coughlin asserted that "[t]he fact remains that the words 'kills them' were used in a direct reference to MNN staff of color that currently manage and/or work at the MNN El Barrio Firehouse."

96. In closing, defendant Coughlin warned plaintiff Halleck that "[f]uture failure to follow MNN policies may result in permanent suspension from accessing MNN facilities and services."

97. On information and belief, defendant Coughlin suspended plaintiff Halleck for three months from airing programs over MNN's cable public access channels because plaintiff Halleck's "The 1% Visits the Barrio" program presented the view that MNN was more interested in pleasing "the 1%" than addressing the community programming needs of those living in East Harlem, including plaintiff Melendez, notwithstanding that MNN calls itself the Manhattan *Neighborhood* Network.

98. On July 6, 2013, plaintiffs Halleck and Melendez met defendant Coughlin by chance at a mutual friend's private party in the Catskills, to which all three had been invited.

99. Plaintiff Melendez politely sought to address his status at MNN with defendant Coughlin.

100. Defendant Coughlin angrily replied that it was not the appropriate time to discuss the matter.

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101. Plaintiff Melendez uttered some vulgarities but did not strike or push or threaten defendant Coughlin.

102. The chance encounter lasted about a minute.

103. Realizing that defendant Coughlin's anger precluded a constructive discussion, plaintiff Halleck led plaintiff Melendez away.

104. By letter to plaintiff Melendez dated August 1, 2013, defendant Coughlin suspended plaintiff Melendez from all MNN services and facilities indefinitely.

105. Defendant Coughlin stated-- falsely-- that during the chance encounter on July 6, 2013, plaintiff Melendez said that he wanted to and was going to "fuck me up."

106. Defendant Coughlin also stated -- falsely -- that plaintiff Melendez pushed him over.

107. Defendant Coughlin further stated-- falsely-- that plaintiff Melendez engaged in a disrespectful and loud confrontation with defendant Morales in March 2012, necessitating staff intervention.

108. Defendant Coughlin also stated -- falsely -- that in July 2012 outside the El Barrio Firehouse plaintiff Melendez was involved in a threatening altercation with an invited MNN guest (Jose Angel Figueroa) following an exchange of insults.

109. In closing, defendant Coughlin stated that MNN had "zero-tolerance for harassment or threats of violence of any kind towards MNN staff, producers or users."

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110. On information and belief, defendant Coughlin suspended plaintiff Melendez from all MNN services and facilities indefinitely because plaintiff Melendez had attended the regular quarterly meeting of the MNN Board on Wednesday evening, March 14,2012 with plaintiff Halleck (see ¶¶ 50-55 *supra*) and because plaintiff Melendez expressed the view in "The 1% Visits the Barrio" program that MNN was more interested in pleasing "the 1%" than addressing the community programming needs of those living in East Harlem, including plaintiff Melendez, notwithstanding that MNN calls itself the Manhattan *Neighborhood* Network.

111. By letter to plaintiff Halleck dated August 9, 2013, defendant Coughlin suspended plaintiff Halleck for one year effective immediately from all MNN services and facilities.

112. Defendant Coughlin repeated his false assertions about plaintiff Melendez's words and actions during the chance encounter on July 6, 2013. *See* ¶¶ 105-06 *supra*.

113. Defendant Coughlin further asserted that MNN continued to be in receipt of complaints about the public posting on the internet of plaintiff Halleck's "The 1% Visits the Barrio" program on YouTube, though he did not state the nature of the complaints, the number of complaints, or who made the complaints.

114. In closing, defendant Coughlin stated that MNN had "zero-tolerance for harassment or threats of violence of any kind towards MNN staff, producers or users."

115. On information and belief, defendant Coughlin suspended plaintiff Halleck for one year from airing programs over MNN's cable public access channels because plaintiff Halleck's "The 1% Visits the Barrio" presented the view that MNN was more interested in pleasing "the 1%" than addressing the community programming needs of those living in East Harlem, including plaintiff Melendez, notwithstanding that MNN calls itself the Manhattan *Neighborhood* Network.

116. Although plaintiff Halleck's one-year suspension from MNN's services and facilities ended on August 9, 2014, she still cannot air "The 1% Visits the Barrio" program on MNN's cable public access channels or, for that matter, any programming in which plaintiff Melendez appears, since plaintiff Melendez is barred from MNN services and facilities.

117. On April 17, 2015, plaintiff Melendez visited MNN's 59th Street facility to submit a "Project Request Form" for a cable public access program entitled "El Barrio (East Harlem) Community Poet, Jesus Papoleto Melendez Chats with El Barrio's ArtSpace P.S. 109 Residency-Artists."

118. Plaintiff Halleck accompanied plaintiff Melendez, videotaping plaintiff Melendez submitting the "Project Request Form" to MNN employees.

119. Defendant Bryce, MNN's Manager of Production & Facilitation, informed plaintiff Melendez during the visit that he was still suspended from all MNN services and facilities indefinitely.

120. MNN security officers escorted plaintiff Melendez from the building.

121. By letter to plaintiff Melendez dated April 24, 2015, defendant Bryce returned plaintiff Melendez's "Project Request Form."

122. Defendant Bryce stated that plaintiff Melendez's indefinite suspension from all MNN services and facilities remained in full force and effect and that plaintiff Melendez was not permitted to access any MNN facility, equipment, or service.

123. Defendant Bryce also stated -- falsely -- that plaintiff Melendez's indefinite suspension was due to plaintiff Melendez's pattern of harassment, threats and violent conduct toward MNN staff and facility users in 2012 and 2013.

124. Defendant Bryce further stated that the videotaping during plaintiff Melendez's April 17, 2015 visit to MNN's 59th Street facility was disrespectful and in direct violation of MNN's Code of Conduct which prohibits "Video, photo or audio recording of any employee, user or guest without their informed consent."

125. Notwithstanding his attempted assault and battery on plaintiff Melendez on July 19, 2012 (*see* ¶¶ 75-80 *supra*), Jose Angel Figueroa continued to have access to MNN services and facilities after that date.

Appendix B

126. The City is aware than MNN has censored plaintiffs' and other cable public access programming, as plaintiff Halleck and other cable public access producers have brought the censorship to the Manhattan Borough President's attention.

127. As result of the foregoing, plaintiffs have suffered emotional distress, mental anguish, embarrassment, humiliation, and violation of their constitutional rights.

128. For plaintiff Halleck, her suspension from airing programs on the Manhattan cable access channels was especially embarrassing and humiliating -- as well as ironic -- since she was an outspoken advocate for the creation and funding of a CAO to administer and manage the cable public access channels in Manhattan in the early 1990's and has spent most of her life advocating and promoting cable access programming not only in New York City but also throughout the United States and abroad.

129. For plaintiff Melendez, his indefinite ban from all MNN services and facilities -- now approaching two-and-one-half years -- was also especially embarrassing and humiliating -- as well as ironic -- given that MNN used videos of plaintiff's classes teaching media skills to East Harlem clients if the University Settlement to lobby the City to support use and remodeling of City property for the El Barrio Firehouse.

130. Plaintiffs have suffered and continue to suffer irreparable harm inasmuch as their free speech rights have been and continue to be denied.

Appendix B

FIRST CLAIM FOR RELIEF

(First Amendment Claim Under 42 U.S.C. § 1983)

131. Plaintiffs repeat and reallege paragraphs "1" through "130" with the same force and effect as if they were fully set forth herein.

132. Required by state regulation and local franchise agreements, the cable public access channels in Manhattan are a designated public forum of unlimited character.

133. The City, through the Manhattan Borough President, has delegated control of that public forum to MNN.

133. Defendants have barred and restricted plaintiffs' access to the above public forum based on viewpoints expressed by plaintiffs in "The 1% Visits the Barrio" program critical of MNN's administration and management of the cable public access channels in Manhattan, in violation of plaintiffs' rights to freedom of speech under the First Amendment to the United States Constitution.

SECOND CLAIM FOR RELIEF

(New York State Free Speech Claim)

134. Plaintiffs repeat and reallege paragraphs "1" through "133" with the same force and effect as if they were fully set forth herein.

135. Defendants have barred and restricted plaintiffs' access to the public forum based on viewpoints expressed by plaintiffs in "The 1% Visits the Barrio" program critical of MNN's administration and management of the cable public access channels in Manhattan, in violation of plaintiffs' rights to freedom of speech under Article 1, Section 8 of the New York State Constitution.

THIRD CLAIM FOR RELIEF

(New York Open Meetings Law Claim)

136. Plaintiffs repeat and reallege paragraphs "1" through "135" with the same force and effect as if they were fully set forth herein.

137. Article 7 of the New York Public Officers Law ("the Open Meetings Law") declares, in part, that: "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy." N.Y. Public Officers Law Art. 7, § 100.

138. To accomplish that purpose, the Open Meetings Law provides that "[e]very meeting of a public body shall be open to the general public, except that an executive session may be called and business transaction therein in accordance with section one hundred five of this article." N.Y. Public Officers Law Art. 7, § 103(a).

139. A "meeting" is defined as "the official convening of a public body for the purposes of conducting public business ...." N.Y. Public Officers Law Art. 7, § 102(1).

140. A "public body" is defined as "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law ...." N.Y. Public Officers Law Art. 7, § 102(1).

141. A "public corporation" is defined to include a municipality. N.Y. Gen. Mun. Law § 66(1)-(2).

142. As an entity which performs a governmental function for both the State and City of New York -- the administration and management of the cable public access channels in Manhattan -- MNN is a "public body" under the Open Meetings Law and is required to make the regular meetings of its board of directors open to the general public.

143. MNN nonetheless continues to hold regular meetings of its board of directors without permitting the general public to attend and videotape the meetings, in violation of the Open Meetings Law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs demand the following relief jointly and severally against all the defendants:

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(A) A preliminary and permanent injunction restraining defendants from interfering with plaintiffs' exercise of their free speech rights over the cable public access channels in Manhattan;

(B) A preliminary and permanent injunction restraining defendants from violating the Open Meetings Law by barring the general public from attending and videotaping regular meetings of MNN's board of directors;

(C) Compensatory damages in an amount to be determined at trial;

(D) Punitive damages in an amount to be determined at trial;

(E) Reasonable attorney's fees and costs of this litigation; and

(F) Such other relief as this Court deems just and proper.

Dated: Brooklyn, New York
February 19, 2016

Respectfully submitted,

/s/
ROBERT T. PERRY (RF-1199)
45 Main Street, Suite 230
Brooklyn, New York 11201
(212) 219-9410
Attorney for Plaintiffs

Appendix B

TO: Emily K. Stitelman (via ECF)
Assistant Corporation Counsel
Administrative Law Division
New York City Department of Law
100 Church Street
New York, New York 10007
Counsel for Defendant, The City of New York

Tamar S. Wise, Esq.
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APPENDIX C — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 28, 2016, FILED AUGUST 23, 2016

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15 CV 8141 (WHP)

DEEDEE HALLECK, *et al.*,

Plaintiffs,

v.

MANHATTAN COMMUNITY ACCESS CORPORATION, *et al.*,

Defendants.

New York, N.Y.
January 28, 2016
10:20 a.m.

Before:

HON. WILLIAM H. PAULEY III
District Judge

[2](In open court; case called)

MR. PERRY: Robert Perry for plaintiffs Deedee Halleck and Jesus Papoleto Melendez. Good morning, your Honor.

Appendix C

THE COURT: Good morning, Mr. Perry.

MS. STITELMAN: Emily Stitelman assistant corporation counsel for the city.

THE COURT: Good morning, Ms. Stitelman.

MS. WISE: Good morning, your Honor. Tamar Wise for Manhattan Community Access Corporation, Daniel Coughlin, Iris Morales, Jeanette Santiago and Cory Bryce.

MR. DE LEEUW: Michael de Leeuw from Cozen O'Connor for the same defendants.

THE COURT: This is an initial conference in this case and a premotion conference.

Briefly, Mr. Perry, what's the nature of the claim here?

MR. PERRY: Your Honor, this is a First Amendment case.

THE COURT: You can remain seated for this conference but pull your microphone close. Pull it to you. Closer.

MR. PERRY: Closer. There we go. Wonderful. Thank you, your Honor.

This is a First Amendment case, your Honor. The plaintiffs claim violation of their First Amendment rights

and their rights under the state free speech guarantee insofar as [3]Manhattan Neighborhood Network suspended Ms. Halleck from programming for three months and then later for a year and suspended Mr. Melendez indefinitely from its services and facilities and programming because of viewpoints that they expressed in a program called The One Percent Visits the El Bario which aired on Manhattan Neighborhood Network's cable channels, access channels in October 2012.

We maintain, your Honor, that the cable public access channels in Manhattan are an electronic public forum created by state law and franchise agreement by the city of New York; that the city, having created the electronic public forum must apply the rules applicable to public fora, that it can't simply avoid those responsibilities by delegating them to Manhattan Neighborhood Network, and that Manhattan Neighborhood Network is a state actor that must abide by those same rules.

THE COURT: All right. When you say that your clients were suspended for a period of three months and then a year for one of them and then indefinitely for the other, what's the current status of those suspensions?

MR. PERRY: Well, Ms. Halleck's suspension ended -- both of her suspensions have ended. Mr. Melendez's suspension remains in effect.

Shortly before filing the lawsuit he made an application to air on a program and it was rejected because the suspension remains in effect. The suspension has been

in [4]effect since August 2013. And while Ms. Halleck's suspension is not in effect, she can't air the programming -- the program the one percent solution -- One Percent Visits the El Bario on Manhattan Neighborhood Network channels and she can't use Mr. Melendez as a speaker in her programs. So in that respect the suspension continues for her too.

THE COURT: Both groups of defendants have submitted premotion letters. Who wants to be heard?

MS. STITELMAN: Good morning, your Honor.

As the city summarized in their premotion letter, plaintiffs' First Amendment claim against the city fails. In order to succeed on a claim under 42 U.S.C. 1983, the plaintiff must allege that the person or entity charged with the constitutional deprivation is a state actor. Plaintiff cannot prove that here. The complaint makes no allegation that the city or the Manhattan borough president, which is the entity that chose Manhattan Neighborhood Network to administer and operate the public access channels in Manhattan had any involvement with the decision to prevent plaintiffs from airing any content on the public access channels. In fact, neither the city nor the borough president have any editorial control over content aired on the public access channels. This is a point that plaintiffs concede in paragraph 29 of their complaint. Simply because the borough president has a role in selecting the nonprofit to operate and administer the public [5]access channels does not make that entity a state actor.

Appendix C

Your Honor, we would argue that if you find that plaintiffs failed to state a federal claim that the court not exercise supplemental jurisdiction on the state claims. To the extent that your Honor does exercise supplemental jurisdiction on the state claims, the First Amendment claim under the New York state Constitution fails for the same reason the federal First Amendment claim fails. And the open meeting law claims fail as well since the plaintiff makes no allegation that the Manhattan borough president had any involvement with the meetings which are controlled by the MNN, Manhattan Neighborhood Network, bylaws which the city has no role in drafting and does not regulate.

THE COURT: Are you aware whether there's any binding authority regarding whether public access television is a public forum subject to First Amendment protections under these circumstances?

MS. STITELMAN: Your Honor, in two cases which are cited in my letter, *Bernas v. Cable Vision* and *Loce v. Time Warner*. The courts in those cases found that the cable providers, Cable Vision and Time Warner, were not state actors but, moreover, they found that the state or the municipality with no editorial control or involvement in crafting the cable operators' policies. So there was not enough of an intersection for it to be a state action.

[6] THE COURT: All right. Thank you.

What about Manhattan Community Access Corporation?

MS. WISE: Your Honor, we agree with the position taken by the city. We would add that the complaint fails to state that MNN is a state actor.

The Supreme Court has made clear that to be equated with the state for purposes of a Section 1983 claim a plaintiff needs to show that a private actor acts as the government and that's demonstrated by showing that the government has the authority to appoint at least the majority of the entity's board.

In this case, plaintiff concedes that MNN's board is mostly comprised of members who are not designated by the city. In fact, the borough president only has authority to appoint 2 of up to 19 members of the board.

And the plaintiff also here fails to meet any of the tests set forth by the Second Circuit for holding a private entity responsible for -- sorry -- holding the private entity accountable as a state actor. There are no facts in the complaint that show that the state compelled any actions by MNN. There are no facts in the complaint showing that the state participated with MNN in denying plaintiff the opportunity to present this video. And there are no facts in the complaint showing that provision of public access television is a function that is exclusively vested in the [7]state.

Your Honor, plaintiff makes the argument in his papers that the Supreme Court has held that public access television is a public forum. And that's not correct. That is a misreading of the court's decision in *Denver Area*.

And, in fact, the majority specifically held that it was not going to decide whether public access television was a public forum.

THE COURT: All right. Both sets of defendants want to make motions. Some of the arguments that you're going to be raising are the same arguments, are they not?

MS. STITELMAN: Yes, your Honor.

THE COURT: So what about filing one consolidated motion to dismiss?

MS. WISE: We can do that, your Honor.

THE COURT: All right. Mr. Perry, I've reviewed your letter in opposition. You see what the arguments are that the defendants intend to advance. Do you wish to amend your complaint to endeavor to meet the arguments that they propose to offer to dismiss the complaint?

MR. PERRY: Your Honor, I think the complaint adequately states the facts I need to state to make my arguments except in one respect. I'm going back and forth on it. That is with regard to Ms. Morales. And we're contemplating -- I have to speak further with my clients about it but we're contemplating dismissing the complaint claims [8]against Ms. Morales. But other than that I believe -- I litigated the *Denver Area* case to the Supreme Court. It's now nearly 20 years ago. And I've read it again. Justice Kennedy and Justice Ginsberg agreed that cable public access channels were designated public fora.

I put in my letter that the plurality left that issue open, but it left the issue open. And Justice Thomas disagreed. But that's all set forth in my letter. I think there is a very decent argument that cable public access channels are public fora.

THE COURT: The point of my question is simply that before we go through this motion to dismiss if you wanted to do something to bolster your pleading to meet their arguments I'm prepared to let you do it.

MR. PERRY: Your Honor, I would -- I'm sorry to interrupt.

THE COURT: Because this is just -- it's not going to be a learning exercise. Having defendants lay out the arguments they want to advance, having discussed it as a conference, and recognizing that you've got the opportunity to replead on those, to address those arguments now. I'm not going to give you leave to replead if I wind up dismissing the complaint on the very same arguments that the defendants have raised in their letter -- in their premotion letter briefs. That's all.

[9]MR. PERRY: I understand, your Honor. I appreciate that. I would like to avail myself of your invitation to --

THE COURT: How much time would you like? Then I'll tee up a motion.

MR. PERRY: Would two weeks --

THE COURT: Whatever you'd like.

MR. PERRY: Two weeks, your Honor.

THE COURT: So, why don't you go ahead then and file -- file an amended complaint by February 11.

MR. PERRY: Actually could I ask for three weeks?

THE COURT: Sure. February 19.

MR. PERRY: Thank you.

THE COURT: Now, assuming that the defendants want to proceed with a motion addressed to the amended complaint, when do you want to file your motion?

MS. WISE: Thirty days, your Honor.

THE COURT: All right. You'll file your motions on March 18. Make it one consolidated motion.

MS. WISE: Yes, your Honor.

THE COURT: How much time would you like, Mr. Perry, to oppose the motion?

MR. PERRY: Thirty days, your Honor.

THE COURT: Sure. April 18.

Any reply by April 28.

I will set the matter down for an oral argument on [10]May -- Friday, May 13 at 12 noon.

I take it -- are the parties in agreement that until the boards are cleared with respect to this motion that it's appropriate for discovery to be stayed?

MS. STITELMAN: Yes, your Honor.

MR. PERRY: Yes, your Honor.

THE COURT: All right. Now, last night I received a letter from a *pro se* Paula Gloria Tsaconas Barton who purported to submit a motion to intervene. I caused it to be docketed on ECF only so that you would be aware of it in advance of this conference. Have you had an opportunity to review it?

MR. PERRY: I noticed it last night about 7 p.m., your Honor. I read it over quickly. I spoke with one of my -- one of the plaintiffs. But beyond that -- I've looked at it. I'm not sure it makes out the requirements for a motion or for intervention as of right. But at this point I'm still thinking about it and speaking with my clients about it.

THE COURT: What do the defendants have to say? Ms. Stitelman.

MS. STITELMAN: Yes, your Honor. I reviewed the letter last night when it came in. It does not appear to comply with Rule 24(c) which requires that motions to intervene be accompanied by a pleading and would also

request that it be set down for a premotion conference to the extent your Honor wants to review the motion.

[11]MS. WISE: We're in agreement, your Honor.

THE COURT: All right. I will set the matter down. You can respond to the proposed intervenor's letter. And we'll take it up on February 19 at 3 o'clock.

Anything further?

MR. PERRY: Nothing from plaintiff, your Honor.

THE COURT: Anything further from the defendants.

MS. STITELMAN: No, your Honor.

MS. WISE: No, your Honor.

THE COURT: All right. I'll see you next month.

UNIDENTIFIED MALE SPEAKER: Your Honor --

THE COURT: Excuse me. No. Have a seat. You're not a party. This is not a school board meeting. You can't just come down here and think you can shout out in my courtroom.

(Adjourned)

APPENDIX D — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DATED MAY 12, 2016, FILED JANUARY 4, 2017

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15 CV 8141 (WHP)

DEEDEE HALLECK,
JESUS PAPOLETO MELENDEZ,

Plaintiffs,

v.

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, IRIS MORALES, JEANETTE SANTIAGO, CORY BRYCE, CITY OF NEW YORK,

Defendants.

ARGUMENT

New York, N.Y.
May 12, 2016
3:40 p.m.

Before: HON. WILLIAM H. PAULEY III, District Judge

***

Appendix D

[2](Case called)

THE COURT: This is oral argument on the defendants' motion to dismiss.

First, as a housekeeping matter, this Court has received a number of pro se motions to intervene and to compel discovery and, I guess, just a few moments ago to disqualify the Court. Discovery has been stayed pending resolution of this motion. The motions to intervene are being held in abeyance until the motion to dismiss is resolved, as is the motion to disqualify.

This Court will not accept any filings made by email or mail directly to chambers. Any pro se litigants must make their submissions through the pro se office. Several individuals have been burdening my chambers with innumerable phone calls with questions seeking advice and everything else. No more phone calls. I'm instructing my clerks not to speak to any of you. I've had it, plain and simple. It disrupts the ordinary course of litigation and how cases are supposed to proceed.

This case is proceeding today on the argument on the motions to dismiss with the parties who are before it.

So with that, who wishes to be heard on behalf of the defendants?

MS. WISE: Your Honor, Tamar Wise for the MNN defendants.

[3]THE COURT: All right. Take the podium.

MS. WISE: Good afternoon, your Honor.

Plaintiffs bring constitutional claims and claims under the New York Open Meetings Law against MNN. But MNN is indisputably a private actor. It receives no city funds; it owns its own property; it appoints the vast majority of its board with independent directors; and it has no contractual relationship with the city. And under circumstances like this, courts are clear that there must be a predicate finding of state action.

THE COURT: But, look, you reject out of hand the plaintiffs' argument that MNN is liable as a state actor, right, if Manhattan's cable public access channels are a public forum, right?

MS. WISE: Well, your Honor --

THE COURT: Do you reject that argument out of hand?

MS. WISE: Yes, your Honor, we dispute that analysis.

THE COURT: By rejecting it, doesn't that create a problem in which there's no remedy for a free speech violation?

MS. WISE: Well, your Honor, there is a remedy. The PSC, the Public Service Commission regulations are those that govern the creation of MNN and the franchising

of the cable networks. And there's an administrative remedy under the PSC, and that's been utilized before by aggrieved producers to bring their claims to the PSC, and the PSC is a body that's best [4]equipped to deal with situations like this. They are the ones that promulgate the regulations for first come, first serve nondiscriminatory behavior, and that's where claims like this belong, your Honor.

THE COURT: Is MNN's only purpose to administer the public access channels?

MS. WISE: Yes, your Honor, it's an independent nonprofit created for that purpose.

THE COURT: Is it the defendants' position that MNN has unfettered discretion to suspend producers and make editorial judgments regarding content?

MS. WISE: Yes, your Honor. In fact, the statutory scheme and the regulatory scheme at issue here prohibits the city or the cable operator from exercising any editorial discretion. Full discretion lies with MNN.

THE COURT: Does MNN maintain that it would be permitted to suspend plaintiffs solely because they criticized MNN?

MS. WISE: Well, your Honor, that's not MNN's position here.

THE COURT: I'm asking you whether MNN's position would be that they would be permitted to suspend plaintiffs solely because they criticized MNN.

MS. WISE: No, your Honor.

MNN is bound by, number one, the regulations of the [5]PSC, which require nondiscriminatory action on the part of the independent entity that administers these public access channels. Moreover, MNN has its own rules and regulations.

THE COURT: But now I'm confused because a few moments ago you said that MNN had the unfettered discretion to suspend plaintiffs' producers who make editorial judgments regarding their content, didn't you? So which is it?

MS. WISE: It's subject to the PSC regulations.

THE COURT: How do you draw the line?

MS. WISE: Respectfully, your Honor, that's something that the PSC needs to determine. MNN makes the decisions that it understands it as best they can pursuant to those regulations, and any dispute about them belongs before the body that created those regulations.

MNN has its own appeal procedure, internal appeal procedure for its own bylaws and rules and regulations that it itself is allowed to promulgate. And then it answers to the regulations that the PSC creates.

THE COURT: I'm just trying to understand for a moment where MNN thinks the line is. You tell me that MNN would not be permitted to suspend the plaintiffs solely because they criticized MNN, but that MNN has unfettered discretion to suspend producers and make editorial judgments regarding content.

MS. WISE: Well, your Honor, the viewpoint [6]discrimination would fall under the nondiscriminatory regulation imposed by the PSC regulations. So we're not saying that MNN would allow to have -- to exercise viewpoint-based discrimination. That falls under the nondiscriminatory --

THE COURT: Would you pull the microphone a little closer? I'm having a hard time hearing you.

MS. WISE: Is this better?

THE COURT: A lot better.

MS. WISE: Sorry.

As I was saying, your Honor, viewpoint-based discrimination would fall under the nondiscriminatory regulation that the PSC mandates.

THE COURT: What's MNN's official position regarding the reasons why plaintiffs were terminated?

MS. WISE: Your Honor, the reason that the plaintiffs were terminated is set forth in the letter exchanges set forth in the complaint, which is that the plaintiffs had

exhibited hostile and threatening language in a video that certain MNN employees felt was threatening and that was violative of the rules and regulations of MNN. That was the reason that that video was not allowed to be aired.

THE COURT: What was threatening about that video?

MS. WISE: I can read you the words.

And this is from --

THE COURT: I've looked at the video. Better than [7]reading the words, isn't it? What's so threatening about it?

MS. WISE: Well, your Honor, the employees at MNN felt threatened by this. They felt that it threatened their own security; an employer is required to take that seriously. This is a time when threats -- you can't judge whether a threat is empty or not; you can't judge whether words like this have something threatening behind them or not.

THE COURT: So who decides whether something is threatening? If one employee says subjectively they're threatened, would that be a basis on which MNN could terminate somebody's privileges?

MS. WISE: Well, your Honor, at least one of the plaintiffs now is able to use MNN. The video would be allowed to be aired if it were edited to exclude the language that MNN had found offensive.

THE COURT: Did MNN ever inform the plaintiffs of that?

MS. WISE: To my knowledge, yes.

THE COURT: When was that?

MS. WISE: I don't have that information in front of me, your Honor, I wasn't prepared for it for this motion, but I can find out.

THE COURT: People get hyperbolic all the time, don't they? What's really so threatening about that?

MS. WISE: Your Honor, I think it's a judgment that [8]MNN needed to make for its own employees. And that's something that went up on appeal internally at MNN and then it was determined that that should remain.

THE COURT: Let's turn to a slightly different issue.

Which case do you think presents the best analysis explaining why public access channels are not public fora?

MS. WISE: Your Honor, I think it's the *Alliance Community Media* case, the ACM case in the D.C. Circuit from 1995.

In that case, the appellate court considered whether a particular regulation imposed was constitutionally improper to the extent that it gave cable operators the option of banning certain kinds of obscenity on public access television.

In that case, the court went through an analysis of why public access channels were not public fora. The reason it gave was public forum is a government-owned property.

This is not government-owned property; plaintiff concedes that. This is not an argument regarding public property.

Private property has not traditionally been considered a public forum. Plaintiffs have pointed to a certain line of *dictum* from a Supreme Court case in 1985, the *Cornelius* case, where the Court mentioned the idea of private property being designated for public use. That idea has never been applied; certainly not in this Circuit. The Supreme Court has twice [9]called that theory attenuated and said it's a far reach to call that private property a public forum.

Indeed, the only controlling case where that idea has ever been brought to fruition is the *Marsh v. Alabama* case of a company town. That was an extreme case where the private entity assumed all functions of the municipality, and plaintiffs don't allege that here.

THE COURT: What about the plaintiffs' argument that the Supreme Court's decision in *Denver Area* calls into question *ACM*?

MS. WISE: Well, your Honor, the pluralities opinion in *Denver Area* did not address the public forum issue; in fact, it said it was premature to decide whether private property could be turned into a public forum. So it didn't address it at all.

THE COURT: What else do you have for me?

MS. WISE: Well, your Honor, I think the important point to make here is that where a private entity is going to be held liable for a constitutional violation, courts have been clear that the predicate inquiry to make is whether there's state action. In fact, the Second Circuit dealt with this issue as recently as 2007 in the *Bernas* matter. In that case, there was a constitutional claim brought against a public access operator. The court went through the state actor analysis. It decided that the state actor analysis tests were [10]not met and it affirmed the dismissal of the constitutional claim. It did not, as the plaintiffs would have here, go straight to the public forum question and move backward from there. Respectfully, your Honor, that is the binding precedent upon this Court.

THE COURT: But let's assume for a moment -- the city argues that it can't be sued because there's no *Monell* liability. You argue that MNN can't be sued because it's a private entity. Are plaintiffs entirely without recourse then if their content is rejected on the basis of viewpoint discrimination?

MS. WISE: No, your Honor.

They can go to the Public Service Commission and bring an administrative proceeding there, as many aggrieved producers have previously done.

THE COURT: Did they do so here?

MS. WISE: Not that I'm aware.

THE COURT: Anything further?

MS. WISE: Nothing from me, your Honor.

THE COURT: All right.

Does the city wish to be heard?

MS. STITELMAN: Yes, your Honor.

Your Honor, plaintiffs fail to state a First Amendment claim against the city. They have not met their threshold showing that the city did anything to abridge plaintiffs' First [11]Amendment rights. In fact, the city can only be found liable under Section 1983 where the city itself caused the constitutional violations at issue.

Plaintiffs attempt to attach liability to the city in two ways. First --

THE COURT: Can the city insulate itself from liability just by designating control of the public access channels to a private corporation?

MS. STITELMAN: Your Honor, in this case the city had no control over those public access channels in the first place. So the cases that the plaintiff cites where there's an issue of delegation, those are fire departments or doctors at prison hospitals where the delegation is something that the city or the state already has an obligation to provide.

They have an obligation to provide fire protection; they have an obligation to provide medical care.

But here the delegation, all that the city -- the city is explicitly barred from exercising the editorial control. They do not require MNN to restrict or allow programming on their public access channels. They simply state first-come-first-serve nondiscriminatory basis.

If the city had taken some sort of editorial control, I would say yes, that they did act in some way. But that is not what happened here.

The first way in which they try to attach liability to [12]the city is to say that they knew about the constitutional violations or alleged constitutional violations and did nothing. This argument fails. Inaction by a city can only be shown to create a First Amendment violation where that alleged inaction is the functional equivalent of a decision by the city itself to violate plaintiffs' First Amendment rights, and that is not what we have here.

The second way they try to attach liability to the city, as your Honor mentioned, was by stating that the city has delegated control of the public access channels. And again, that argument fails. In fact, the city is not a party to the grant and use agreement between Time Warner and MNN, which sets forth MNN's administration of the public access channels in the city. The city does not fund MNN's operations; MNN's headquarters are not leased or acquired from the city.

Appendix D

The Manhattan borough president --

THE COURT: But the city gave valuable franchises, didn't it, to Time Warner in both northern and southern Manhattan.

MS. STITELMAN: Yes.

THE COURT: And as part of those agreements, those franchise agreements, didn't the city require Time Warner to set aside certain channels for public access?

MS. STITELMAN: Well, the federal government requires that those franchise agreements do set aside public access [13]channels. Furthermore, the city, through the Manhattan borough president, is obligated to designate a community access organization; in this case that is MNN.

But once that happens, the city's involvement with public access television ends completely, in fact, by law, because they are not allowed to have the editorial control, they don't have the agreement between -- the grant and use agreement is between Time Warner and MNN. So once MNN is designated as that community access organization, they then contract with Time Warner and the city does not participate in that at all; it does not draft that agreement; had no say in it.

Your Honor, I think that looking at the case *Jersawitz v. People TV*, which are cited in our papers, this is a case out of the Northern District of Georgia and it is very

similar; so I think it's helpful for municipal liability. In that case, the City of Atlanta and People TV, which is the nonprofit, contracted so that People TV would administer the public access channels in the City of Atlanta.

Again, they were required to administer those channels on a nondiscriminatory basis and comply with all rules and regulations. In that case, the plaintiff sued both the City of Atlanta and People TV and argued that his First Amendment rights were violated when he was banned from People TV's facilities and equipment.

[14]The Court specifically found no municipal liability, holding that there was no evidence that the City of Atlanta itself had taken any action in violation of plaintiff's First Amendment rights or that it had a policy or a custom so as to encourage People TV to violate plaintiff's First Amendment rights. The Court specifically noted that the City of Atlanta required People TV to comply with all laws and operate public access on a nondiscriminatory and reasonable basis.

Your Honor, we argue that *Jersawitz* -- that the same should happen here; that the Court should decline to find municipal liability since there is no allegation here that the city has a policy or custom permitting MNN its employees, its board of directors to violate plaintiffs' First Amendment rights or anyone's free speech rights; and to the contrary, that it requires MNN to comply with all regulations and laws and make public access channels available on a first-come-first-serve nondiscriminatory basis.

THE COURT: Does the city share MNN's view expressed here at oral argument that the appropriate forum for resolution of these issues is the PSC?

MS. WISE: Yes, your Honor.

THE COURT: Which case do you think presents the best analysis explaining why public access channels are not public fora?

MS. STITELMAN: Your Honor, I would agree with MNN [15]that it's the *ACM* case; however, it's the city's position that the public forum, whether it is public or not public, has no effect on city liability in this case.

THE COURT: All right.

Anything further, Ms. Stitelman?

MS. STITELMAN: I would only add, your Honor, that the plaintiffs have withdrawn their claim for monetary damages. The only relief that plaintiffs seek are injunctions allowing them to air their content over public access channels and to attend MNN meetings. This is not relief that the city can provide and only MNN can permit that.

THE COURT: All right. Thank you, counsel.

MS. STITELMAN: Thank you, your Honor.

THE COURT: Mr. Perry, do you wish to be heard?

MR. PERRY: Yes, your Honor.

Good afternoon, your Honor.

Plaintiffs have plausibly alleged constitutional violations on the defendants' part.

As to MNN, plaintiffs have plausibly alleged state action on MNN's part because the cable public access channels in Manhattan are public forum and MNN, in administering that forum, in regulating the speech over that forum, is performing a traditional and exclusive state function.

The Public Forum Doctrine is a fundamental First Amendment principle. It derives from Justice Owen Roberts' [16]famous statement in *Hague v. CIO*. And I might add to my papers, your Honor, that I realized, preparing for this argument, that was a concurring opinion; it was a concurring opinion for only Justice Roberts and Justice Black. Justice Stone, I believe, joined in the merits. But it became the majority view for the Supreme Court a number of years later. I think that's relevant because opposing counsel have argued that all we have here is a concurring and dissenting opinion from Justice Stevens.

As to the public forum argument, again, the Supreme Court classifies public forum into two categories: Traditional and designated public forum. It is our position that the cable public access channels in Manhattan are designated public forum. PSC regulations require cable

operators to set aside certain channels for public access, require open nondiscriminatory access, noncommercial programming at no charge and bar editorial control by cable operators and by the city.

Let me just mention right now, this is the first time today -- it's not in their briefs -- that I've heard defendants argue essentially primary jurisdiction that the plaintiffs' remedy is not to file a lawsuit in court, but to go into – go to the PSC. First time I've heard that. I haven't dealt with primary jurisdiction; I would have addressed it if it had been raised in the papers. But I did argue a case in the New York [17]Court of Appeals in 1982, *Capital Telephone v. Paterson Telephone Company*. And the case involved the accommodation between the regulation of a telephone company and the state antitrust law called the Donnelly law. I was an assistant attorney general at the time.

The court, it is my recollection, it's a long time ago, came down with the position that we had advocated; that there was a way for the antitrust lawsuit to go forward. I would be glad to address that primary jurisdiction issue. I don't think it's a bar to this lawsuit here probably for the same reasons that I argued in the *Paterson Telephone Company* case.

THE COURT: I'm going to give you an opportunity to submit a letter memorandum on that primary jurisdiction issue.

MR. PERRY: I'll be glad to, your Honor.

In any event, getting back to my argument, the public service regulations and city franchise agreements require the cable operator, Time Warner, to set aside certain channels for public access for expressive activities.

Using Justice Kennedy's observation in *Denver Area*, which was applicable to all public access channels generally, because these cable access channels in Manhattan are required by government fiat, they are a designated public forum of unlimited character. The mere fact that they are not real property doesn't preclude public forum analysis, because public [18]forum analysis applies to any channel of communications. Also the fact that Time Warner owns the cable systems doesn't preclude public forum analysis.

The Supreme Court said in *Cornelius* in 1985 that public forum analysis can apply to even private property dedicated to public use. Yes, opposing counsel referred to a couple of cases, *Lloyd* and *Tanner* decided in the mid '70s that held that if a shopping center owner, for example, opens up his property to public customers, that, in and of itself, does not establish a public forum for First Amendment purposes.

But in the late '70s, in the *Pruneyard* case, the Supreme Court recognized in upholding a California constitutional provision that required a shopping center owner there to make available the public areas for certain expressive activities. The Supreme Court recognized that California thereby created a public forum. The shopping center owner could still adopt reasonable time, place, and

manner regulations. So *Tanner* and *Lloyd* did not involve a situation where a government fiat had created a public forum on private property.

Let me just mention a few other things.

Opposing counsel also mentioned the *Bernas* case from the Second Circuit. I had read that case. I didn't address it in our brief because they did not cite it in their brief. Moreover, it's a summary order; it's a summary opinion. It has [19]no precedential value. It's not binding on this Court; it has no precedential value because it may not have been -- a lot of time may not have been put into it.

As to the *ACM* case, I address that in our papers. The *ACM* case went up to the Supreme Court. The Supreme Court reversed the divided *en banc* court in *ACM* on the public access channel provision which authorized cable operators to remove indecent or offensive programming. Two justices, Kennedy and Ginsburg, ruled contrary to the *ACM* majority that public access channels were public fora. Justice Breyer, in his plurality opinion, just said it's premature because this was a new medium. It's now 20 years later.

THE COURT: Aside from Justice Kennedy's concurrence in *Denver Area*, which opinion do you think best presents the analysis explaining why public access channels should be considered public fora?

MR. PERRY: I would concede, your Honor, that all of the cases -- there's a, quote/unquote, handful of cases

on each side. And a lot of the cases there's not a heck of a lot of analysis.

I was involved in the first case many years ago through the ACLU, the *Missouri Knights* case in Missouri. And even going back over that, I thought that was a reasoned analysis. The judge there concluded that public access channel -- the Kansas City public access channel was a public [20]forum, citing the *Greenberg* case involving the privately-owned letter box. I still think that case is a very helpful case because, yes, the letter boxes, no question, they are private property. And the Court did rule that that's not -- it's a nonpublic forum. But it's relevant, I submit here, because the Court did apply public forum analysis there. It just simply concluded that although the letter mailboxes were part of the United States mail system and, thus, under government control, even though they weren't a public property, government property, they were nonetheless a nonpublic forum. So I think in that respect that the *Missouri Knights* case is a very helpful case.

But I would concede that there's a handful of cases, district court cases, on one side and district court cases on the other side, and then there's the *ACM* case. But there's not a lot of analysis in a lot of these cases. In all of the cases that the city cites, especially the cases from this Circuit, they involve pro se plaintiffs, Glendora in particular. Although I should add that the Second Circuit allowed me to argue one case on behalf of Glendora many years ago; but she basically was a pro se litigator, an amazing pro se litigator.

In any event, there's not a lot of discussion or analysis in any of those cases; they simply cite *ACM*. And for the reasons I point out in my brief, the *ACM* case is unpersuasive. The majority there was simply flatly wrong that [21]the Supreme Court has limited public forum analysis simply to government property. It applied public forum analysis in *Southeastern Promotions*, in *Southeastern Promotions* and in *Pruneyard* and in *Greenberg* to private property. That's only after the Supreme Court recognized formally the public forum doctrine in the '70s going back to prior cases, including the *Semerol* case, Hague. Justice Roberts begins his famous statement by saying, Wherever the title to streets and parks lie, they are held in trust for the public. The language thus in *Lee*, the *Port Authority* cases is thus *dictum*; it's *dictum* that's contrary to Supreme Court precedent.

Finally, as I pointed out to the Supreme Court in the *Denver Area* case many years ago, public streets, many public streets are privately owned; and yet they are indisputably public forum.

THE COURT: You distinguish the Second Circuit's decision in *Loce v. Time Warner* on the ground that it addressed leased -- and not public access -- channels.

Can you elaborate on that distinction? And I guess what I'm focusing on from the Second Circuit's decision is the following language in which the Circuit said: "The fact that federal law requires a cable operator to maintain leased access channels, and the fact that the cabled

franchise is granted by a local government, are insufficient either singly or in combination to characterize the cable operator's conduct of its [22]business as state action nor does it suffice that cable operators, in their management of leased access channels, are subject to statutory and regulatory limitations."

That's a direct quote from the Second Circuit.

Could you elaborate for me on the distinction between leased and public access channels and why it matters for purposes of distinguishing that case's holding that the cable operator was not a state entity for First Amendment purposes?

MR. PERRY: Well, your Honor, leased access channels are channels that are set aside, that are required by the cable -- first required by the Cable Act of 1984 for the requirement of the cable operator to make channel capacity available to unaffiliated program providers.

One of the problems in the cable industry has to do with just simply the economics of the cable industry. In every community, almost every community, there has always been usually one cable operator having the franchise *de facto* or *de jure*, whatever monopoly, there's a bottleneck, as in antitrust parlance, it's a bottleneck. In order to promote competition, as well as to promote First Amendment values, Congress required the cable operator to set aside certain channel capacity for unaffiliated program providers. It's principally economic regulation, common carrier regulation, as opposed to public forum analysis. It's common carrier regulation.

Appendix D

Common carrier regulation evolved -- actually it goes [23]way back to 15th, 16th century England. It came out of the law of public callings. Certain services, transporting goods for hire between cities on donkeys, for example, or wharves or ferries, ferry boats, and certain professions, because they were deemed essential, either because they were deemed essential services or because they were monopoly or near monopoly characteristics, this law of public callings or *juris publici* evolved in England and it got carried over into America.

So in the 19th century you had the -- and I again address this in the brief because it wasn't raised. In the 19th century you had the Supreme Court recognize the common carrier concept in a steamboat case in 1858, the *Niagara Propellers* case. Common carriage was both economic regulation to ensure that certain businesses that had monopoly control or provided essential services or one or both, provided service fairly; so there's a nondiscrimination requirement, first come, first served, that sort of thing. But it also was invoked to allocate risk. So if you were a common carrier, you had insurer liability. And that was, I think, the substance of the *Niagara Propeller* case in 1858.

And then eventually the Congress passed the Interstate Commerce Act in the late '80s, 1880s, creating a federal common carrier scheme for railroads. That was eventually applied to telephone and telegraph companies in the 1910 Mann-Elkins Act. [24]It was applied to pipeline companies. There was a famous pipeline case in 1914. But then in 1934 it was added to the communication -- when the Communications Act was passed. That's common carrier

regulation, your Honor. It looks a little bit like public forums, but it's really economic regulation. So that's what leased access is about.

I brought a case in -- it's a long time ago, but in the mid '80s against -- it was before Time Warner had the franchise; it was called *Manhattan Cable TV* at the time. And I brought a case on behalf of citizens who wanted movie channels other than HBO. And New York Citizens Committee for Cable TV, which is Manhattan Cable TV. And that involved the leased access provisions. And our argument was principally competition, lack of competition. And that's what *Loce* is, I think, largely about; that's why leased access is different. I would concede there is an overlap there, because leased access does promote not only competition, but it promotes diversity of information, at least according to advocates.

But I submit public access is different.

Unless your Honor has any further questions for me, I'll rest on my briefs.

THE COURT: All right. Thank you very much.

MR. PERRY: Thank you.

MS. WISE: Your Honor?

THE COURT: Yes, Ms. Wise.

[25]MS. WISE: Thank you, your Honor.

Appendix D

First I wanted to note is that plaintiffs don't explain in their papers or in their argument why it is proper for a court to engage in the analysis in the chronologically improper order. Courts find it exceedingly rare to apply the Constitution to public entities. And so that's why the state actor analysis should happen before the public forum analysis and not backwards.

In fact, all the cases that plaintiffs cite in which a public access channel was found to be a public forum, in those cases it was first found to be a state actor. And in that case, the relationship between the public access operator and the state was very, very close. The state appointed all of their board of directors, the state owned the public access channel, the state had to approve every move made by the public access channel. So I think that's an important point here because the state actor analysis just can't be skipped; there's no controlling authority for doing that.

Where Mr. Perry speaks about government fiat, if you trace back the genesis of this government fiat idea where by government fiat you can create a public forum, that only applies in the context of public property. The government fiat cases stem from -- the original case was the peri-educational Supreme Court case. In that case it dealt with government property that was being used that the government decided to use [26]for a public purpose. That's not the case here.

Your Honor, where plaintiffs talk about the idea behind *Cornelius*, that Supreme Court case that talked

about private property being dedicated for public use, *Cornelius* did not deal with private property being dedicated to public use; it dealt with government property. And the point about public property being designated for -- public property being dedicated to public use was *dicta* basically, and it's never been cited approvingly by any controlling court since.

The other Supreme Court cases that Mr. Perry talked about, the *Mailbox* case, the *Pruneyard* case -- well, the *Pruneyard* case was under California law, so that doesn't have any relevance here. The *Mailbox* case, as Mr. Perry notes, that private property was found not to be a public forum because it was private property.

In fact, the New York Court of Appeals has said that the analysis needs to go in the direction of first establishing a state actor, and then finding it to be a public forum. And that's in the *SHAD v. Smith Haven Mall* case. And it said that while in that case it was dealing with a shopping mall, while it may have some of the attributes of a public forum, it may be tempting to consider it a public forum, you first have to go through the state actor analysis. In that case, the state actor analysis, after that analysis was made, none of the tests were met, and so the Court said, We are not going any further; [27]there's no constitutional violation here.

As for *Loce*, I agree with your Honor, I don't think there's any difference with respect to the state actor analysis as between a public access channel or a leased channel. The state actor inquiry does not change based

upon what kind of state actor you're dealing with. The tests are meant to apply in any kind of context. The section that your Honor read from *Loce*, we submit, explains why MNN is not a state actor.

I did want to reiterate that we weren't saying that MNN has unfettered discretion; it is, of course, bound by the regulations set forth by the PSC and by the grant agreement and by the franchise agreement between the city and Time Warner that MNN behave in a nondiscriminatory and allow access on a first come, first serve basis.

THE COURT: Thank you, Ms. Wise.

Anything further, Ms. Stitelman?

MS. STITELMAN: No, your Honor.

THE COURT: All right.

Anything further, Mr. Perry?

MR. PERRY: Could I respond to a point?

THE COURT: Just for a minute, sure.

MR. PERRY: Just for a minute.

In terms of the analysis that opposing counsel just suggested, first you have to look at whether there's state action, and then you look at whether there's a public forum,

I [28]think looking at those cases that opposing counsel cited, it's simply the sequence of --

THE COURT: Your argument is that they are intertwined.

MR. PERRY: That's right. That's right.

THE COURT: I got it in your brief.

MR. PERRY: Got it. All right. Thank you, your Honor.

THE COURT: All right.

Counsel, thank you for your arguments.

Decision reserved.

Have a good afternoon.

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No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

vs.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Whether the Second Circuit erred in failing to apply this Court's "state action" tests and in adopting a *per se* rule that private operators of public access channels are "state actors" for constitutional purposes, even where the state has no control over the private entity's board, policies, programs, facilities or operations, provides none of its funding, and is not alleged to have been involved in the conduct challenged in the pleadings.

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioners Manhattan Community Access Corporation, Daniel Coughlin, Jeanette Santiago, and Cory Brice[1] were Defendant-Appellees in the court of appeals in No. 16-4155. Petitioner Manhattan Community Access Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Respondents DeeDee Halleck and Jesus Papoleto Melendez were Plaintiff-Appellants in the court of appeals in No. 16-4155.

The City of New York was a Defendant-Appellee in the court of appeals in No. 16-4155 but has not joined in this appeal.

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[1] Petitioner Cory Brice's name was misspelled "Bryce" in the Amended Complaint.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Second Circuit's opinion, Pet. App. 1a-33a, is reported at 882 F.3d 300. The district court's opinion, Pet. App. 34a-53a, is reported at 224 F. Supp. 3d 238.

JURISDICTION

The Second Circuit issued its opinion on February 9, 2018, and denied Petitioners' request for rehearing *en banc* on March 23, 2018. Pet. App. 54a-55a. Petitioners filed a petition for writ of certiorari on June 21, 2018, which this Court granted on October 12, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. I, "Congress shall make no law . . . abridging the freedom of speech . . . ."

This case also involves United States Code, Title 42, Section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case is about preserving the confines of the "state action" doctrine, which separates purely private conduct from governmental action for constitutional purposes. This Court has commanded "[c]areful adherence" to the state action doctrine to "preserve[] an area of individual freedom by limiting the reach of federal law." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)). At the same time, this narrow approach "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. The Second Circuit did not adhere—let alone carefully—to the state action doctrine.

Manhattan Community Access Corporation ("**MNN**") is an independent, not-for-profit company that operates two access centers and four public access channels in the Borough of Manhattan in New York City (the "**City**"). More than *25 years ago*, the Manhattan Borough President chose MNN to replace Time Warner as the independent operator of the public access channels in Manhattan. The Manhattan Borough President has the right to nominate only two of MNN's 13 board directors. The other directors are independent; the City, therefore, does not control MNN's board. Moreover, Respondents did not—and could not—allege that the City plays *any role whatsoever* in MNN's operations, programs, policies, personnel decisions, facilities, or funding. The vast majority of MNN's funding comes from the cable operators that provide cable service in Manhattan via independent agreements between MNN and

those cable operators. MNN has no contract with the City.

Respondent Halleck has produced programs that have periodically appeared on MNN's public access channels. Respondent Melendez has taken part in some of MNN's community-based trainings and has appeared in at least one program shown on MNN. Respondents brought this Section 1983 claim alleging violations of the First Amendment, against MNN, some of its employees, and the City, arising out of disciplinary actions taken against them for violating MNN's internal rules and regulations.

On a motion to dismiss, the district court reviewed the allegations in light of each of this Court's state action tests and correctly determined that Respondents had not plausibly alleged that MNN is a state actor under any of them. On appeal, however, the Second Circuit ignored these tests altogether. Instead, relying on Justice Kennedy's partial concurrence and partial dissent in *Denver Area Educ. Telecom. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996), the Second Circuit held 1) that MNN's public access channels are designated public fora of unlimited character, and then determined 2) that Petitioners are, therefore, state actors because, in 1991, the Manhattan Borough President chose MNN to operate the public access channels on Time Warner's cable system in Manhattan.[2]

The decision below should be reversed as to Petitioners. Respondents have not alleged that MNN is a state actor under any of this Court's tests establishing the exceptional conditions warranting hold-

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[2] The Second Circuit also affirmed the district court's dismissal of the City. Petitioners do not challenge that holding.

ing a private entity subject to the First Amendment. MNN does not carry out a traditional and exclusive public function, it is not in a symbiotic relationship with the City, the allegations in the pleadings make clear that MNN did not act pursuant to any government compulsion, and the City does not control MNN through its board or otherwise.

In determining *on the pleadings* that MNN is a state actor, the Second Circuit applied what is essentially a *per se* test that ignores the vast differences in public access operators around the country. Equally troubling is the analysis itself: looking first at the forum (in this case public access channels), determining that the electronic forum is a *constitutional* public forum, and then working *backwards* to find that its operators are therefore state actors. That analysis flies in the face of Supreme Court precedent. It also ignores the differences among public access providers, ignores the concerns raised by the plurality in *Denver Area* about adopting a categorical approach, and ignores the radical changes that have occurred in the decades since *Denver Area*. Indeed, the rapid expansion of the Internet into the daily lives of most Americans and the rise of social media platforms (not to mention the other nooks and crannies of online life) have changed media and media consumption forever. One encounters countless fora every day that resemble (to some degree or other) the proverbial soapbox in the corner of the public park and that to some degree or another arise out of or are subject to local, state, and federal regulation. But that does not make them *constitutional* public fora.

Careful adherence to the state action analysis remains critical for determining those rare instances where private activity can be considered state action. This case does not present one of those instances.

A. The Regulatory and Contractual Framework for Public Access

Cable operators must obtain franchises from local governments in order to lay the cable or optical fibers needed to reach subscribers. Pet. App. 35a; JA19-20, ¶¶ 15-16. Cable television franchising in New York State is regulated by the New York State Public Service Commission ("**PSC**"). Pet. App. 36a; JA21-22, ¶¶ 25-29. Among other things, the PSC regulations require the designation of public, education, and government ("**PEG**") channels in New York. New York Code, Rules and Regulations ("**NYCRR**"), tit. 16, § 895.4(b) (2018). They also set the minimum standards for these channels. *Id.* at § 895.4(c). Specifically, the PSC regulations require that content on public access channels must be "noncommercial" and that access must be on a "first-come, first-served, nondiscriminatory basis." *Id.* at § 895.4(a). The regulations also prohibit cable television franchisees and local governments from exercising editorial control over public access channels. *Id.* at §§ 895.4(c)(8-9). The regulations further provide that "[a]ny interested person may seek a ruling from the [PSC] concerning the applicability or implementation of any provision of this section or any provision of a franchise concerning PEG access upon the filing of a petition." *Id.* at § 895.4(f)(2). The PSC hears challenges by (among others) public access producers to ensure that public access channel operations comply with these regulations. *See, e.g., Amano v. City of New*

York, No. 04-V-0321, 2006 WL 4470759 (N.Y.P.S.C. Aug. 30, 2006).

The Cable Communications Policy Act of 1984, Public Law No. 98-549, 98 Stat. 2779 (1984) (the **"1984 Cable Act"**), requires cable operators to carry *leased* access channels and *allows*, but does not mandate, franchising authorities to require cable operators to set aside PEG channels. 47 U.S.C. §§ 531(a-c); Pet. App. 35a-36a. Among many other things, the 1984 Cable Act prohibits cable operators from exercising editorial control over public access channels. 47 U.S.C. § 531(e); Pet. App. 36a.

In 1991, the City renewed cable franchises in Manhattan, which had previously been awarded to Time Warner Entertainment Company, L.P. Pet. App. 36a-37a. Sections 8.1.1 and 8.1.8 of the franchise agreements between the City and Time Warner provide that Time Warner must set aside certain cable channels for public access programming and that these channels shall be operated by an "independent, not-for-profit, membership corporation" chosen by the Manhattan Borough President. Pet. App. 5a, 36a-37a; JA22, ¶¶ 31-32.

Also in 1991, pursuant to the terms of the franchise agreement between the City and Time Warner, the Manhattan Borough President chose MNN as the independent entity to operate the public access channels set aside by Time Warner in Manhattan. Pet. App. 5a, 37a; JA23, ¶¶ 34-35. MNN has no agreement with the City; it only has agreements with cable operators. JA23, ¶¶ 32-33. The New York state regulations do not require MNN to provide any municipal updates or reports. Instead, the franchise agreements contemplate that the inde-

pendent nonprofit operating the public access channels will adopt its own rules and regulations (without requiring City approval), and the applicable regulations and private agreements do not allow the City to provide any input. Pet. App. 35a-37a.

B. Manhattan Neighborhood Network

MNN is a private nonprofit corporation organized under the laws of the State of New York. JA19, ¶ 11. Petitioner Dan Coughlin is MNN's Executive Director, Jeanette Santiago is MNN's Programming Director, and Cory Brice is MNN's Manager of Production and Facilitation. Pet. App. 6a-7a. MNN is the largest provider of independently produced programming in the country and provides editing, media training and youth classes at its facilities. JA23-25, ¶¶ 37, 39-42, 46.

Since 1991, the Manhattan Borough President has had no control over MNN's operations, policies, finances, or any other aspects of MNN's governance. The Manhattan Borough President can only nominate (subject to board approval) two of MNN's 13 directors. Pet. App. 37a; JA23, ¶¶ 34-36. The remaining directors—the vast majority of the board—are independent. *Id.* MNN receives no funding from the City or the State. JA23, ¶ 35. MNN owns outright its own facilities: its offices and its main studio are on West 59th Street in Manhattan, and MNN also owns and maintains a community facility in East Harlem known as the MNN El Barrio Firehouse Community Media Center. Pet. App. 37a; JA24, ¶ 38.

C. Facts Giving Rise to This Action

Respondent Halleck is a public access producer and Respondent Melendez has participated in MNN's community training programs. Pet. App. 38a-40a; JA24, ¶¶ 39-40. MNN took disciplinary action against Respondents for violating its rules and regulations. Specifically, after Respondent Melendez violated MNN policies by harassing Iris Morales, an MNN employee, MNN withdrew Mr. Melendez's invitation to participate in a community building education program. Pet. App. 38a-40a; JA28, ¶¶ 69-70.

Thereafter, Mr. Melendez appeared in and Ms. Halleck produced a video called "The 1% Visit El Barrio." DeeDee Halleck, *The 1% Visits El Barrio*, YouTube (July 29, 2012), https://www.youtube.com/watch?v=QEbMTGEQ1xc. The program included harassing and threatening language directed toward MNN staff during a lengthy diatribe by Mr. Melendez, spoken while standing outside of the MNN El Barrio Firehouse Community Media Center. Mr. Melendez's monologue included the following:

> Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or ***someone kills them*** so that I can come and have access to the facility here.

Pet. App. 39a; JA30, ¶ 81 (emphasis added).

Respondents submitted the program to MNN, and it aired on an MNN public access television channel on October 2, 2012. Pet. App. 40a; JA31, ¶ 84. After receiving complaints from its staff that the video in-

cited violence against MNN staff and violated MNN's zero tolerance policy on harassment, MNN barred further airings of the program containing the offending "kills them" language. Pet. App. 40a; JA31-33, ¶¶ 86-88, 95-97. By letter dated October 11, 2012, Respondent Halleck, as the producer of record, was suspended for three months from airing programs over MNN's public access channels. Pet. App. 40a; JA31, ¶¶ 85-87. Following an additional violent confrontation with an MNN employee in July 2013, MNN suspended Respondent Melendez indefinitely from all MNN services and facilities. Pet. App. 40a; JA33-34, ¶¶ 98-109. Also, in August 2013, MNN suspended Respondent Halleck for one year from all MNN services and facilities due in part to her role in the July 2013 violent confrontation. Pet. App. 40a; JA35, ¶¶ 111-14.

D. Procedural History

On October 15, 2015, Respondents filed a Complaint against Petitioners, the City, and Ms. Morales, the MNN employee. JA6. Respondents alleged violations of 42 U.S.C. Section 1983, Article 1, Section 8 of the New York State Constitution, and New York's Open Meetings Law, claiming they were damaged as a result of their respective suspensions. JA6, 16-43. After an exchange of pre-motion to dismiss letters between the parties and a pre-motion conference before the district court, Judge Pauley gave Respondents an opportunity to amend their Complaint to address Petitioners' arguments in support of dismissal (including the argument that the Petitioners were not state actors). JA6-8. Respondents amended their Complaint and removed Ms. Morales as a defendant. JA18-19, ¶¶ 10-14.

1. District Court Proceedings

On March 18, 2016, Petitioners and the City moved to dismiss the Amended Complaint, principally on the ground that the pleading did not plausibly allege that MNN and its employees were state actors subject to the First Amendment. JA9-11. Following briefing and oral argument, the district court granted the motion to dismiss in an Opinion and Order dated December 13, 2016. Pet. App. 34a-53a.

The district court dismissed the First Amendment claims against Petitioners, finding that Respondents had failed to allege adequately that MNN was a state actor subject to Section 1983. Pet. App. 44a-53a. The district court held that MNN's actions could not be considered "governmental action for constitutional purposes" under this Court's test in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995), because "among other things, the Manhattan Borough President only has the authority to appoint two of MNN's thirteen board members." Pet. App. 44a.

The district court then discussed this Court's "public function" test, described at length by the Second Circuit in *Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 257 (2d Cir. 2008). Pet. App. 45a. Judge Pauley noted that "regulation of free speech in a public forum is 'a traditional and exclusive public function'" and stated that the "public function" test would be satisfied if a public access channel was a constitutional public forum like a sidewalk or park. Pet. App. 45a-46a (citation omitted).

The district court noted that the only Circuits to have considered the issue (the D.C. and Sixth Circuits) both held that public access channels are not

constitutional public fora. Pet. App. 46a-47a, 51a & n.9. The district court also noted that a plurality of this Court in *Denver Area* "found it 'unnecessary' and 'unwise' for the Court to 'definitely [] decide whether or how to apply the public forum doctrine to leased access channels,'" and, by extension, public access channels. Pet. App. 47a-48a (quoting *Denver Area*, 518 U.S. at 749). The district court recognized that Justice Kennedy (along with Justice Ginsburg) would have held that public access channels *are* designated public fora and Justice Thomas (along with Chief Justice Rehnquist and Justice Scalia) would have held that *they are not*. Pet. App. 47a-49a.

The district court concluded that public access channels are not constitutional public fora, adopting what it termed "the consensus view of courts within the Second Circuit." Pet. App. 50a-51a (citations omitted). In making this determination, the district court noted that "MNN is a private company that operates television channels," and "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." Pet. App. 51a (quoting *Glendora v. Cablevision Sys. Corp.*, 893 F. Supp. 264, 269 (S.D.N.Y. 1995)). Citing the Second Circuit's holding in *Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 267 (2d Cir. 1999), the district court rejected Respondents' argument that "public access channels are designated public fora because they are 'required by government fiat.'" Pet. App. 52a (citation omitted).

The district court also dismissed the First Amendment claims against the City, noting that Respondents' "sole allegation against the City [was] the bald assertion that it was 'aware that MNN has cen-

sored plaintiffs' and other cable access programming,'" which was an insufficient allegation under the standard for municipal liability set forth in *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). Pet. App. 43a (quoting JA38, ¶ 126).

2. Appellate Proceedings

Respondents filed a timely Notice of Appeal to the Second Circuit on December 14, 2016. JA1.

On February 9, 2018, the Second Circuit issued a splintered decision with three separate opinions. Two Judges (Newman and Lohier, JJ.), writing separately, voted to reverse the district court's dismissal of Petitioners but affirm its dismissal of the City. Pet. App. 1a-18a. Judge Newman authored the majority opinion (the "**Majority**"), Judge Lohier authored a concurring opinion (Pet. App. 19a-21a), and Judge Jacobs authored a dissent. Pet. App. 22a-33a

The Majority acknowledged that, because MNN is a private entity, "the viability of the Plaintiffs' First Amendment claim against it and its employees depends on whether MNN's actions can be deemed state action." Pet. App. 9a (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)). But instead of engaging in a traditional state action inquiry as established by this Court, the Majority skipped to consideration of whether public access channels (regardless of who operates them) are "public fora" for First Amendment purposes. Pet. App. 10a.

Relying on Justice Kennedy's partial concurrence and partial dissent in *Denver Area*, the Majority held that:

> where, as here, federal law authorizes setting aside channels for public access to be 'the electronic marketplace of ideas,' state regulation requires cable operators to provide at least one public access channel, a municipal contract requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums.

Pet. App. 13a-14a. The Majority noted that, "whether the First Amendment applies to the individuals who have taken the challenged actions in a public forum depends on whether they have a sufficient connection to governmental authority to be deemed state actors." Pet. App. 14a. The Majority then summarily concluded that the necessary connection between MNN and the City "is established in this case by the fact that the Manhattan Borough President designated MNN to run the public access channels." Pet. App. 14a-15a.

The Majority attempted to distinguish its holding from *Loce*, where the Second Circuit had determined that "[t]he fact that federal law requires a cable operator to maintain leased access channels and the fact that the cable franchise is granted by a local government are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as state action." *Loce*, 191 F.3d at 267. The Majority dismissed any comparison to *Loce* because *Loce* involved "leased access" channels as opposed to "public access" channels. Pet. App. 15a.

The Majority acknowledged that other courts have rejected characterizing public access channels as public fora, and that, specifically, the D.C. and Sixth Circuits "have not considered public access channels to be public forums." Pet. App. 16a & n.8 (citing *Alliance for Cmty. Media v. F.C.C.*, 56 F.3d 105, 123 (D.C. Cir. 1995) (*"ACM"*) (*en banc*) (finding "no state action ... because that essential element cannot be supplied by treating access channels as public forums"), *rev'd in part on other grounds sub nom., Denver Area*, 518 U.S. at 768; *Wilcher v. City of Akron*, 498 F.3d 516, 519-22 (6th Cir. 2007) (holding private operator of public access channel was not a state actor after applying traditional state actor tests, and therefore not reaching subsequent public forum analysis)). But the Majority noted that it did not agree with these decisions and instead agreed with Justice Kennedy's partial concurrence and partial dissent in *Denver Area*. Pet. App. 17a.

Judge Lohier's concurrence below added that "in the specific circumstances of this case we might also rely on the public function test" to find state action. Pet. App. 19a. Judge Lohier concluded that MNN exercised the "traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels" because MNN's programming relates to, "*in a word, democracy*." Pet. App. 20a-21 (emphasis added). In reaching this conclusion, Judge Lohier took judicial notice of cherry-picked portions of MNN's website that were not part of the record below and concluded that MNN largely offered political-type programming, ignoring the other types of programming and non-expressive services that MNN provides. Pet. App. 20a.

The concurrence below acknowledged that its "public function" analysis was in direct conflict with the Sixth Circuit's *Wilcher* decision. Pet. App. 19a. Where *Wilcher* found the "public function" test for state action was not met because "TV service is not a traditional service of local government," the concurrence below held that a public access operator performs a traditional and exclusive government function, satisfying the "public function" test, because it is inappropriate to look at public access as simply an "entertainment facility." Pet. App. 19a-20a (quoting *Wilcher*, 498 F.3d at 519).

Unlike the Majority, Judge Jacobs' dissent applied the traditional state action analysis, as other Circuits have, and determined that the pleadings did not allege that MNN was a state actor. The dissent noted that "[t]he majority conclusion that MNN is a state actor opens a split with the Sixth Circuit; considerably worse, it opens a split with the Second Circuit." Pet. App. 33a. Judge Jacobs explained that "[a] private entity may become a state actor ***only*** under the following limited conditions," and listed the three state action tests discussed by the Second Circuit in *Sybalski*, 546 F.3d at 257. Pet. App. 23a (emphasis added). The dissent applied each of these tests and concluded that MNN was not a state actor. Pet. App. 23a-32a.

First, the dissent below determined that MNN was not a state actor under the "compulsion test" because "MNN's designation in a franchise agreement and regulation by a municipal commission do not in and of themselves demonstrate that MNN is 'controlled' or 'compelled' by the state." Pet. App. 23a-24a. Judge Jacobs further noted that Respondents made "no allegation of government involvement in

the[ir] suspensions from which state action can be inferred." Pet. App. 24a.

The dissent next determined that MNN was not a state actor under the "joint action" test because neither "the statutory guidelines for cable access [n]or the borough's oversight activities establish joint action between the Government and MNN" and because the City did not control a majority of MNN's board as required under *Lebron*. Pet. App. 24a.

Finally, the dissent noted that MNN was not a state actor under the "public function" test because "[t]he ownership and operation of an entertainment facility are not powers traditionally exclusively reserved to the State, nor are they functions of sovereignty." Pet. App. 25a (internal quotation and citation omitted).

The dissent below would have held that *Loce* (which addressed leased access channels) controlled and that the operation of public access channels does not constitute state action simply because such channels may be required by government fiat. Pet. App. 26a-27a. "[T]he logic of *Loce*," according to the dissent, "applies with equal force to public-access programming" because "[c]able operators are equally obligated to provide both 'forums': federal law requires them to set aside a portion of their capacity for leased access ... and permits franchising authorities to require (as the relevant one does) a similar set-aside for public access." Pet. App. 28a. The dissent below concluded that, "if anything, the *Loce* analysis applies to public-access channels *a fortiori*." Pet. App. 27a.

By Order dated March 23, 2018, the Second Circuit declined to grant Petitioners' request for rehearing. Pet. App. 54a-55a.

On June 21, 2018, Petitioners filed a timely petition for writ of certiorari. By order dated October 12, 2018, this Court granted the petition.

SUMMARY OF ARGUMENT

Petitioner MNN is not a state actor or part of the government under any of this Court's state action tests. MNN is a private nonprofit that operates four public access channels in Manhattan. The City does not control MNN's board of directors and plays *no role whatsoever* in MNN's operations, programs, policies, personnel decisions, facilities, or funding.

Nonetheless, the Second Circuit held—*on the pleadings*—that Petitioners are state actors, subject to constitutional liability under Section 1983. In reaching this conclusion, the Second Circuit held first that public access television channels are *constitutional* public fora. This holding was based on Justice Kennedy's partial concurrence and partial dissent in *Denver Area*. Justice Kennedy would have held that public access stations are designated public fora of unlimited character, but that position was either outright rejected or deemed premature by seven members of this Court. The Second Circuit then worked backwards, holding that if MNN's channels were constitutional public fora, Petitioners were therefore state actors because—more than 25 years ago—the Manhattan Borough President designated MNN to operate those channels.

There is no precedent for skipping the state action analysis and jumping straight to consideration of whether a forum is (by its very nature) a *constitutional* public forum. This analysis is faulty because the determination of the *forum* question (which considers the extent of government control of government-owned property) *assumes* an answer to the *state action* inquiry. This is why the courts around the country that have considered whether public ac-

cess stations are public fora have uniformly applied the threshold state action analysis instead of looking at the nature of the forum in a vacuum. Moreover, the Second Circuit's holding creates a one-size-fits-all, *per se* rule that would place all public access channels in the state action bucket regardless whether the channel was run by a municipality, a private independent organization or the cable operator.

The Second Circuit's backward state action analysis and categorical forum determination ignore the concerns expressed by the *Denver Area* plurality—that public access channels are run by very different entities, with capable systems of local accountability, and that technology appeared to be rapidly evolving. These concerns are even more pressing today than they were in 1996, given the proliferation of new forms of media. And there are certainly countless new types of fora—including social media platforms—that bear *some* level of resemblance to traditional public fora. But they are not automatically *constitutional* public fora. That is why the threshold state action inquiry is critical.

The Second Circuit chose to ignore this Court's threshold state action tests. And Petitioners are not state actors under any of those tests.

MNN is not "part of the government" under this Court's *Lebron* decision because, even though the Manhattan Borough President long ago designated MNN to operate the public access channels in Manhattan, the City retained no control over MNN. MNN is not a state actor under the "public function" test because the operation of television stations is not a traditional and exclusive role of government.

MNN is likewise not a state actor under the "compulsion" or "coercive power" test because there were no allegations that the City coerced or cajoled MNN into anything—much less the challenged conduct at issue in the Amended Complaint. MNN is also not a state actor under the "joint action," "close nexus," or "symbiotic relationship" test because there were no allegations that the City and MNN worked together or were joint participants in either the actions complained of or anything else. Lastly, MNN is not a state actor under the "entanglement" or "entwinement" theory because there is no ongoing connection between MNN and the City of New York—and certainly nothing approaching the "pervasive entwinement" described in *Brentwood*.

Here, applying this Court's proper state action inquiry, the Amended Complaint does not plausibly allege that Petitioners are state actors, and the Amended Complaint was properly dismissed by the district court.

ARGUMENT

I. THE SECOND CIRCUIT'S ANALYSIS IS INCONSISTENT WITH THIS COURT'S STATE ACTION CASES AND CREATES A NEW, UNWORKABLE STATE ACTION EXCEPTION

The decision below is an unprecedented and unwarranted departure from this Court's decades-long treatment of the constitutional liability of private actors. Relying on Justice Kennedy's partial concurrence and partial dissent in *Denver Area*, the Majority below determined first that Manhattan's public access channels are *constitutional* public fora:

> where, as here, federal law authorizes setting aside channels for public access to be 'the electronic marketplace of ideas,' state regulation requires cable operators to provide at least one public access channel, a municipal contract requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums.

Pet. App. 13a-14a. The Majority then worked backwards. Recognizing that private entities cannot be held liable for constitutional violations unless they are deemed to be "state actors," the Second Circuit continued: "[t]hat [sufficient] connection [to governmental authority] is established in this case by the fact that the Manhattan Borough President designated MNN to run the public access channels," because, thereby, "[MNN employees] are exercising precisely the authority to administer such [designated public] forum conferred upon them by a senior municipal official." Pet. App. 14a-15a.[3]

The Second Circuit's analysis places the cart squarely in front of the horse, departs from this

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[3] Perhaps more egregiously, the Second Circuit made this determination on a motion to dismiss. It determined, under the pleading standard this Court articulated most recently in *Iqbal*, that the facts alleged "state a claim to relief that is ***plausible on its face***" with respect to whether Petitioners could be considered state actors. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted and emphasis added). But the Amended Complaint does not plausibly allege any of the state action indicia that this Court has considered.

Court's state action doctrine, and creates a rubric that is fraught with problems.

A. There is no Precedent for Skipping the Threshold State Action Analysis

The Constitution does not impose liability on private actors except in those rare circumstance where a nominally private actor is deemed to be a "state actor." *See Blum v. Yaretsky*, 457 U.S. 991, 1002-03 (1982) (the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful") (internal quotation and citation omitted); *Lugar*, 457 U.S. at 937 ("[I]t is a fundamental fact of our political order" that constitutional liability is only applied to conduct "fairly attributable to the State."); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) ("conduct of private parties lies beyond the Constitution's scope in most instances" and only where private entities "must be deemed to act with the authority of the government" are such private actors "subject to constitutional constraints").

In determining those exceptional cases where private parties can be subject to constitutional claims, this Court has ***never*** skipped the state action inquiry. To the contrary: this Court has consistently commanded "[c]areful adherence to the 'state action' requirement [in order to] preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar*, 457 U.S. at 936; *see also Tarkanian*, 488 U.S. at 191 (same); *Edmonson*, 500 U.S. at 619 (a preliminary determination that a private entity acted under color of state law respects the "great object of the Constitution," which is to "permit citizens to structure their private relations as they choose").

This Court most recently addressed these issues in *Brentwood*. There, the Court noted:

> The judicial obligation is not only to 'preserv[e] an area of individual freedom by limiting the reach of federal law' and avoi[d] the imposition of responsibility on a State for conduct it could not control,' ... but also to assure that constitutional standards are invoked 'when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.

531 U.S. at 295 (emphasis in original) (quoting *Tarkanian*, 488 U.S. at 191; *Blum*, 457 U.S. at 1004).

Indeed, as described below in Section I(B)(2), other than the Second Circuit in this case, the Circuits and district courts that have considered the constitutional liability of private operators of public access channels have *uniformly* first applied the state action inquiry. The Second Circuit's failure to make this threshold analysis undermines decades of constitutional jurisprudence crafted with the goal of separating purely private conduct from government conduct subject to the First Amendment.

B. There is no Precedent for the Second Circuit's Public Forum Determination

1. Denver Area *did not Hold That Public Access Channels are Constitutional Public Fora*

Justice Breyer's plurality decision in *Denver Area* (joined in relevant part by Justices Stevens,

O'Connor, and Souter) explicitly refused to consider whether public access channels were public fora, finding it "premature." 518 U.S. at 742. The plurality was concerned with "changes taking place in the law, the technology, and the industrial structure related to telecommunications" and did not wish to "declare a rigid single standard, good for now and for all future media and purposes." *Id.* at 741-42; *see also id.* at 742 ("[W]e believe it *unwise and unnecessary* definitively to pick one analogy or one specific set of words now." (emphasis added)).

Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) would have held that public access channels *are not* constitutional public fora. *Id.* at 826. As Justice Thomas wrote, "[c]able systems are privately owned and privately managed, and petitioners point to no case in which we have held that government may designate private property as a public forum." *Id.* at 827. Justice Thomas also noted that this Court has "never even hinted that regulatory control, and particularly direct regulatory control over a private entity's First Amendment speech rights, could justify creation of a public forum." *Id.* at 829. Justice Thomas concluded that "the numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of a public forum." *Id.* at 831.

These concerns raised in 1996 remain compelling reasons to reject the Second Circuit's analysis and conclusion.

2. *Where Courts Have Found Public Access Channels to be Public Fora, They Have First Applied State Action Tests*

The Majority below suggests that courts considering "whether a public access channel is a public forum ... have reached conflicting results." Pet. App. 16a. But this is inaccurate. Rather, courts faced with similar issues have *uniformly* engaged in the threshold state action analysis first. Where those courts found no state action, they did not engage in any further forum analysis.[4] For example, the Sixth and D.C. Circuits both considered whether private operators of public access channels are state actors. *See Wilcher*, 498 F.3d at 519-22; *ACM*, 56 F.3d at 113-21. Both Circuits applied the traditional state action tests and concluded that private operators of public access channels are not state actors. *See id.* Moreover, the D.C. Circuit flatly rejected the suggestion that "by calling [public access] channels 'public forums' they may avoid the state action problem and invoke the line of First Amendment decisions restricting governmental control of speakers because of

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[4] The Second Circuit's decision conflicts with its own prior decisions that engaged in threshold state action analysis to determine the constitutional status of private operators of leased and public access channels. *See Bernas v. Cablevision Sys. Corp.*, 215 Fed. App'x 64, 68 (2d Cir. 2007) (applying state action tests to private actor operating public access channel, finding tests not satisfied, and not engaging in forum analysis); *Loce*, 191 F.3d at 266-67 (applying "close nexus" state action test to cable operator providing leased access channels and finding no state action). Petitioners presented this case for *en banc* review given this departure from precedent, but the Second Circuit declined such review. Pet. App. 54a-55a.

the location of their speech." *ACM*, 56 F.3d at 121.[5]

Similarly, district courts around the country considering the constitutional liability of private operators of public access channels have routinely conducted the state action inquiry first, and where they have found no state action, they then have no reason to engage in forum analysis. *See, e.g.*, *Loren v. City of New York*, No. 16-cv-3605, 2017 WL 2964817, at *4 (S.D.N.Y. July 11, 2017) (applying compulsion, joint action, and public function tests and finding no state action); *Clorite v. Somerset Access Television, Inc.*, No. 14-cv-10399, 2016 WL 5334521, at *9-10 (D. Mass. Sept. 20, 2016) (applying *Lebron* analysis to public access channel and finding no state action, and noting that forum analysis would be necessary only if state action was present); *Griffin v. Pub. Access Cmty. Television*, No. 10-cv-602, 2010 WL 3815797, at *2-4 (W.D. Tex. Sept. 27, 2010) (applying compulsion, joint action, and public function tests and finding no state action); *Hebrew v. Houston Media Source, Inc.*, No. 09-cv-3274, 2010 WL 2944439, at *4-7 (S.D. Tex. July 20, 2010) (same); *Morrone v. CSC Holdings Corp.*, 363 F. Supp. 2d 552, 558 (E.D.N.Y. 2005) (same); *Huston v. Time Warner Entm't*, No. 03-cv-0633, slip op. at 3-5

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[5] On appeal, this Court in *Denver Area*, 518 U.S. at 737-43, found that the state actor inquiry was not necessary to determine the constitutionality of the challenged statute and instead considered whether the regulations were sufficiently tailored—leaving the portion of the D.C. Circuit's decision holding that public access channel operators are not state actors undisturbed. Indeed, seven years after *Denver Area* was decided, the D.C. Circuit once again found that the private operator of a public access channel was not a state actor. *See Glendora v. Sellers*, No. 03-7077, 2003 WL 22890043 (D.C. Cir. Nov. 25, 2003).

(N.D.N.Y. Mar. 25, 2004) (Doc. 31) (same), *aff'd on other grounds*, 127 Fed. App'x 528 (2d Cir. Mar. 31, 2005); *Glendora v. Tele-Commc'ns, Inc.*, No. 96-cv-4270, 1996 WL 721077, at *3 (S.D.N.Y. Dec. 13, 1996) (same); *Glendora v. Marshall*, 947 F. Supp. 707, 712 (S.D.N.Y. 1996) (same); *Glendora*, 893 F. Supp. at 269-70 (same).

Even in those cases where courts have found public access channels to be constitutional public fora, these findings were made *after* some threshold state action test was satisfied—and, then, only upon factual allegations or the factual record making clear that the government *directly controlled* the public access channel. *See, e.g.*, *Egli v. Strimel*, No. 14-cv-6204, 2015 WL 5093048, at *3-4 (E.D. Pa. Aug. 28, 2015) (first holding that the complaint adequately alleged state action, and then engaging in forum inquiry to determine level of judicial scrutiny); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 89-91 (D. Mass. 2002) (noting that the first inquiry "is whether [the public access channel] is a state actor," and the "second issue is whether [it] is a 'public forum'"; finding that *Lebron* test was met, triggering inquiry into nature of forum to determine level of constitutional review); *Jersawitz v. People TV*, 71 F. Supp. 2d 1330, 1337-38 (N.D. Ga. 1999) (applying the *Lebron* analysis and concluding that, where the City of Atlanta retained control over the public access center, public access channel "[wa]s an agency of the City for purposes of guaranteeing constitutional rights"; thereafter, engaging in forum analysis); *cf. Horton v. City of Houston, Tex.*, 179 F.3d 188, 190 n.3 (5th Cir. 1999) (where parties did not dispute the presence of state action, engaging in forum analysis).

In a rare subset of cases, the government so directly controls and operates the public access channel or its allegedly speech-restricting conduct that the state action element is presumed and courts appropriately find the public access channel to be a constitutional public forum. *See, e.g.*, *Coplin v. Fairfield Pub. Access Television Comm.*, 111 F.3d 1395, 1401-02 & n.4 (8th Cir. 1997) (where the city and public access channel operator jointly disciplined producers with objectionable content, court proceeded to forum analysis and determined channel could not discriminate based on viewpoint); *Brennan v. William Paterson Coll.*, 34 F. Supp. 3d 416, 419-21, 426-30 (D.N.J. 2014) (where township owned public access channel, which state university controlled and operated, court determined that constitutional claim was plausibly alleged and found it imprudent to resolve at that juncture the exact nature of the forum); *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 52-53 (D. Me. 2002) (predicting on motion for temporary restraining order that court would treat city-controlled public access channel as a designated public forum where municipality itself restricted plaintiff's speech by shutting down public access channel); *Britton v. City of Erie*, 933 F. Supp. 1261, 1264-66, 1268-69 (W.D. Pa. 1995) (where city created local authority, pursuant to statute, to control public access channels, and City Council voted to transfer all of its assets, equipment, and liabilities to the City itself, engaging in forum analysis and determination of whether challenged action was a reasonable government restriction); *cf. ACM*, 56 F.3d at 121 ("But a 'public forum,' or even a 'nonpublic forum,' in First Amendment parlance is government property. ... State action is present because the property is the

government's and the government is doing the restricting.").[6]

The Second Circuit's analysis deviates from this Court's precedent and from the analysis and conclusions reached on similar facts by its sister Circuits.

3. This Court has Consistently Held That Privately-Owned and Controlled Fora are not Constitutional Public Fora

This Court's reluctance to characterize public access television channels as *constitutional* public fora in *Denver Area* is consistent with its long history holding that private property does not qualify as a constitutional public forum. Instead, the Court has invariably described public fora as *government-owned or -controlled property*. *See, e.g.*, *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018) ("Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums."); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) ("We have previously used what we have called 'forum analysis' to evaluate government restrictions on

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[6] Even in such cases, courts have acknowledged the difficulty in applying forum analysis to public access channels. *See, e.g.*, *Horton*, 179 F.3d at 192 ("the public forum doctrine should not be extended in a mechanical way to the very different context of public television-broadcasting"; forum analysis presented a "conundrum," which the court did not ultimately address); *Demarest*, 188 F. Supp. 2d at 91, 93 (whether public access channel is a public forum is "open to debate" and noting that, "[f]ortunately, this motion does not require the court to resolve the *Denver Area* conundrum").

purely private speech that occurs on government property."); *U.S. v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003) ("to create [a designated public] forum, the government must make an affirmative choice to open up its property for use as a public forum"); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) ("the government creates a designated public forum when it makes its property generally available to a certain class of speakers"); *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (constitutional forum analysis entails "assessing restrictions that the government seeks to place on the use of its property").

Despite this clear precedent, Respondents have previously argued that dicta in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), extends the public forum analysis to "private property dedicated to public use." *Id.* at 801. But *Cornelius* only makes this statement in passing, with no elaboration, analysis or discussion. *See id.* at 801-06. Indeed, *Cornelius* itself dealt with *government-owned* property and engaged in its forum analysis in that light. *See id.* at 801.

Both before and since *Cornelius*, this Court has outright rejected the argument that private property is subject to constitutional forum analysis. *See Lee*, 505 U.S. at 681 (holding that constitutional character of government-owned airport terminal cannot be determined by analogy to bus and rail stations: "much of the evidence [relating to the latter] is irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had *private* ownership") (emphasis in original); *id.* at 698 (Kennedy, J., concurring) (acknowledging that "private spaces of similar character are not subject to the dic-

tates of the First Amendment"); *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976) (calling the argument that the First Amendment reaches privately-owned spaces, or "'private property [dedicated] to public use'" an "'attenuated doctrine'") (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1968)); *see also Denver Area*, 518 U.S. at 742 ("We therefore think it premature to answer the broad questions that Justices Kennedy and Thomas raise in their efforts to find a definitive analogy, deciding, for example, the extent to which private property can be designated a public forum."); *id.* at 827 (Thomas, J., dissenting) (referring to the *Cornelius* excerpt regarding private property as "dictum").

Indeed, Respondents' position would have to rely on the lone case where this Court found First Amendment rights on privately-owned and controlled property, *Marsh v. Alabama*, 326 U.S. 501 (1946),[7] but *Marsh* is limited to its facts, which are not applicable here. There, the state of Alabama permitted the Gulf Shipbuilding Corporation, a private company, to build a "company town" called Chickasaw. *Id.* at 502-03. This Court noted that, other than its private ownership, Chickasaw "has all the characteristics of any other American town": *i.e.*, paved streets and sidewalks, a sewer system, a business district, a police force and a federal post office. *Id.* Several Jehovah's Witnesses were arrested for trespassing under a state statute when they tried to

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[7] In *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 324-25 (1968), this Court found that a privately-owned shopping mall could not exclude a union that was protesting labor issues at a store at the mall. *Logan Valley* was thereafter overturned by *Lloyd*, 407 U.S. 551, as recognized by *Hudgens*, 424 U.S. at 517-18.

hand out religious pamphlets on Chickasaw's streets. *Id.* at 503-04. The Court held that, because the private company was performing the exclusively governmental function of operating a municipality, it was subject to the Constitution. *Id.* at 509-10.

Marsh is a unique case—and this Court has subsequently limited its holding to its unique facts. In his "vigorous dissent" in *Logan Valley*, 391 U.S. 308 (1968), *abrogated by Hudgens*, 424 U.S. 507, Justice Black—the author of the *Marsh* opinion—resisted the Court's expansion of the *Marsh* holding to a private shopping mall. 391 U.S. at 328-33 (Black, J., dissenting). Justice Black wrote in his *Logan Valley* dissent: "Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town." *Id.* at 332 (emphasis in original). As this Court noted in *Flagg Bros.*, "[t]his Court ultimately adopted Mr. Justice Black's interpretation of the *limited reach* of *Marsh* in *Hudgens* ... in which it announced the overruling of *Logan Valley*." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 (1978) (emphasis added); *see also Lloyd*, 407 U.S. at 561-62 (noting that *Marsh* dealt with "an economic anomaly of the past, 'the company town,'" which "'functionally' [was] no different from municipalities of comparable size" and its holding was "simply ... that where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied"). Here, there are no allegations that MNN has assumed "*all* the attributes of a town"—or anything like that. *Logan Valley*, 391 U.S. at 332 (Black, J., dissenting) (emphasis in original).

The "limited reach of *Marsh*" therefore has no applicability here. *Flagg Bros.*, 436 U.S. at 159.

4. The Majority's Public Forum Determination Effectively Imposes a per se *Rule That all Public Access Channels are State Actors*

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court cautioned against adopting *per se* tests for state action:

> Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the [Constitution]'s embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account '[d]ifferences in circumstances [which] beget appropriate differences in law.'

365 U.S. at 725-26 (quoting *Whitney v. State Tax Comm'n*, 309 U.S. 530, 542 (1940)); *Burton*, 365 U.S. at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the

State in private conduct be attributed its true significance.").

The Majority below attempted to cabin its holding to the facts alleged in this case, stating that it was not "determining whether a public access channel is necessarily a public forum simply by virtue of its function in providing an equivalent of the public square." Pet. App. 13a. But the Majority's reasoning would sweep most—if not all—public access channels into the state actor category. Indeed, the same boilerplate criteria the Second Circuit relied on (*i.e.*, that public access is: authorized by federal law; mandated by state law; and designated by a franchise authority (*id.* at 13a-14a)) will apply to many—if not all—public access channels, all of which are creatures of federal and state law and local contracts.

The holding, therefore, amounts to a *per se* declaration that all public access channels in the Circuit are constitutional public fora, regardless of the type of operator or the nature and degree of government involvement with the channel or the operator. For example, all cable franchisees in New York are *required* to set aside public access channels by a combination of federal law, state regulation, and franchise agreements; the Majority's analysis would necessarily convert all private operators of these channels—including cable operators such as Time Warner Cable—and their employees into state actors.[8] This adoption of a "one-size-fits-all" rule—

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[8] The same statutory and regulatory scheme that gives rise to MNN allows the cable franchisee (Time Warner) to operate public access channels at the designation of the Manhattan Borough President. 16 NYCRR § 895.4(c)(1). For example, Time Warner Cable (now Spectrum) operates a public access television channel in Ithaca, New York. *See* Pegasys,

particularly on the pleadings—is inconsistent with this Court's caution against categorical rules and ignores the far more critical factual inquiry of whether (and to what extent) there is government control over that public access channel.

Indeed, the Second Circuit's reasoning ignores the fact that, as this Court explained in *Denver Area*, public access channels have historically been run in various configurations and, most importantly, by a diverse set of operators: "Municipalities generally provide in their cable franchising agreements for an access channel manager, who is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner." *Denver Area*, 518 U.S. at 761 (plurality opinion). More than twenty years later, that is still the case.[9] The Second Circuit's decision threatens to obscure these important differences.

In addition to lacking precedent, the Second Circuit's proposed shortcut around the traditional state action analysis has obvious flaws. Looking at the nature of the forum instead of looking for state action confuses the question. Certainly the quad of a

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http://pegasys.webstarts.com/index.html (last visited Dec. 3, 2018).

[9] There are over two thousand community PEG stations across the country run by a diverse mix of private nonprofit entities, cable operators, educational institutions, governmental entities, and others, according to the Community Media Database. *See* Community Media Database, http://communitymediadatabase.org/ (last visited Dec. 3, 2018) (select Community Access TV / Spreadsheet Directory; listing community access stations in each state along with category of operating entity).

private college looks and feels like the quad of a public college, but that does not transform it into a constitutional public forum—even where a raft of regulation covers how a private college operates. Similarly, many social media platforms are (in some sense) the "equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet." *Denver Area*, 518 U.S. at 791 (Kennedy, J., concurring in part and dissenting in part) (internal quotation and citation omitted). But that does not make them constitutional public fora. The determination of whether a forum is a constitutional public forum must depend on the predicate existence of state action in order to separate private conduct from constitutionally-subject action in any meaningful way.

C. The Second Circuit's Belated State Action Determination is Tautological and Insufficient

After first determining that MNN's public access channels are constitutional public fora, the Majority reasoned that the Manhattan Borough President's decision in 1991 to have MNN operate Manhattan's public access channels constituted "[t]hat [sufficient] connection [to governmental authority]" to find state action. Pet. App. 14a-15a. But this belated and tautological state actor determination does not bolster the Second Circuit's analysis in any way. Indeed, standing alone, the fact that the Manhattan Borough President chose MNN to operate Manhattan's public access channels over 25 years ago is clearly not enough to show the relevant state action factors this Court has considered, *i.e.*: (1) government coercion of the disciplinary action taken

against the Respondents; (2) joint participation with the government; (3) pervasive entwinement with the government; or (4) direct government control of a government-created entity. And, of course, if "designation" was sufficient to support state action, then any private cable operator, wherever it operates a public access channel, would likewise be a state actor subject to First Amendment claims.

II. HAD THE SECOND CIRCUIT PROPERLY CONDUCTED THE THRESHOLD STATE ACTOR ANALYSIS, IT WOULD HAVE HELD THAT MNN IS NOT A STATE ACTOR OR PART OF THE GOVERNMENT

The Second Circuit applied none of the tests this Court has developed to identify those rare circumstances where a private entity's conduct "can fairly be attributable to the state." *Lugar*, 457 U.S. at 937. Had the Second Circuit properly conducted the state actor analysis, it would have concluded, as the district court did, that MNN is not a state actor or part of the government and therefore cannot be liable for claims under Section 1983.

A. MNN is not a Part of the Government Under the *Lebron* Test Because the Government Does not Control its Board

The City does not control MNN's board, and MNN is therefore not a state actor (or a part of the government) under the analysis in *Lebron*. In *Lebron*, this Court was faced with the question of whether Amtrak was a state actor when it selected content for public displays in New York's Penn Station. 513

U.S. at 401. Justice Scalia's majority opinion noted that it "may be unnecessary to traverse that difficult terrain [of deciding whether particular private action might be deemed that of the state]" if Amtrak was "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* at 378, 394. In other words, the Court did not need to decide whether the particular conduct at issue constituted state action if Amtrak was deemed part of the government itself.

In making that determination, the Court considered Amtrak's genesis, its relationship with the government, and the degree of control the government exercised over Amtrak. *See id.* at 383-86. The Court noted that Amtrak was created specifically by Congressional statute, the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (1970) ("**RPSA**"), which Congress found was necessary "to avert the threatened extinction of passenger trains in the United States" and that "public convenience and necessity require the continuance and improvement" of such rail service. *Id.* at 383-84.

The RPSA specifically "authorize[d] Amtrak's incorporation, ... set forth its structure and powers, ... and outline[d] procedures under which Amtrak will relieve private railroads of their passenger-service obligations and provide intercity and commuter rail passenger service itself." *Id.* at 384. The RPSA also provided for "many matters of structure and power" with respect to the governance of Amtrak, including how its board of directors would be selected—*i.e.*, six of the nine members would be appointed by the President of the United States, two members by the holders of Amtrak's preferred stock (which was the Unit-

ed States government at the time), and the president of Amtrak as the ninth member, who was selected by the other eight. *See id.* at 385.

Given these facts, and notwithstanding the express disclaimer in the RPSA that Amtrak was not a government agency, the *Lebron* Court found that Amtrak was in fact part of the government for purposes of constitutional liability. *See id.* at 398. The Court held: "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and *retains* for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400 (emphasis added).[10]

Applying the *Lebron* analysis in this case, MNN is not a part of the government. The Second Circuit Majority relied heavily on the fact that the Manhattan Borough President designated MNN to be the nonprofit operator of public access channels in Manhattan. But that fact, standing alone, is not sufficient to satisfy the *Lebron* inquiry. The Second Circuit failed to take the next step in the *Lebron* analysis: determining whether the Manhattan Borough President retained authority to nominate a majority of MNN's directors. But nowhere does the Amended

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[10] Justice O'Connor, in dissent, would not have addressed whether Amtrak was a part of the government because the question raised in the petition for certiorari was on the narrower state action question as to the challenged conduct. *Id.* at 400 (O'Connor, J., dissenting). Justice O'Connor would have held that the conduct at issue was "a matter of private business judgment and not of Government coercion" and would have affirmed the dismissal of the action based on the failure of the facts to satisfy the state action tests. *Id.*

Complaint allege that the government *ever* had authority to appoint a majority of MNN's directors. MNN is not a state actor (or part of the government) under *Lebron*.

B. MNN Does not Perform a Traditional and Exclusive Government Function, so it is not a State Actor Under the "Public Function" Test

The "public function" test considers whether a private entity is performing a function *traditionally and exclusively* performed by government. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-53 (1974); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 831, 842 (1982); *Flagg Bros.*, 436 U.S. at 158-60. This Court has cautioned that the "public function" inquiry, by design, has "carefully confined bound[aries]" because, "[w]hile many functions have been traditionally performed by governments, ***very few have been 'exclusively reserved to the State.'***" *Flagg Bros.*, 436 U.S. at 159, 163 (emphasis added) (examining prior "public function" cases and noting that "their scope is carefully defined" and that what those cases "have in common [is] the feature of exclusivity," such as "education, fire and police protection, and tax collection"). The few functions this Court has found to meet the narrow application of the "public function" test include an election run by a private political party, *Terry v. Adams*, 345 U.S. 461, 468-70 (1953), operating a public park, *Evans v. Newton*, 382 U.S. 296, 302 (1953), and the exercise of peremptory challenges, which assists the government in the selection of juries, the "quintessential governmental body" (*Edmonson*, 500 U.S. at 624; *Georgia v. McCollum*, 505 U.S. 42, 54 (1992)).

Recognizing the narrow confines of this inquiry, this Court has consistently rejected attempts to find state action under the public function test where the stringent criteria—*performing a traditional and exclusive government function*—are not met. For example, in *Jackson*, this Court held that Metropolitan Edison Co., a private corporation authorized to provide utilities by the state's award of a certificate of public convenience, was not a state actor for purposes of constitutional claims arising out of an alleged wrongful termination of utility services. 419 U.S. at 346-48. The Court held that, even though Metropolitan held a near monopoly on the provision of utilities, supplying utility services was not a function traditionally and exclusively performed by the State; and, indeed, courts had "rejected the contention that the furnishing of utility services is either a state function or a municipal duty." *Id.* at 353.

Similarly, in *Flagg Bros.*, this Court declined to find state action in a private storage facility's sale of belongings pursuant to a New York Uniform Commercial Code regulation permitting a warehouse owner to sell goods entrusted to their care (following a bailor's eviction from an apartment and deposit of the goods with the bailee) for nonpayment of warehousing fees. 436 U.S. at 153-54. The Court rejected the contention that New York had delegated to the private storage facility its "sovereign monopoly power over binding conflict resolution" and allowed the private storage facility to "execute a lien and thus perform a function which has traditionally been that of the sheriff." *Id.* at 155. Instead, the Court held that "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function." *Id.* at 161.

Finally, in *Rendell-Baker*, the Court considered whether a private school for children with behavioral issues, which received up to 90% of its funding from public sources and which was regulated by public authorities, was a constitutional state actor. 457 U.S. at 831-34. The Court observed that there could "be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry" and "[t]hat a private entity performs a function which serves the public does not make its acts state action." *Id.* at 841-42. The Court found the "public function" test was not met because providing education for students who could not be served by traditional public schools was not a task exclusive and traditional to government. *Id.* at 842; *see also San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544-45 (1987) (U.S. Olympic Committee did not perform a constitutional "public function" because "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function"); *Blum*, 457 U.S. at 1011-12 (provision of long-term nursing care not "'traditionally the exclusive prerogative of the State'") (quoting *Jackson*, 419 U.S. at 353); *Polk Cnty. v. Dodson*, 454 U.S. 312, 318-19 (1981) (public defender was not performing a "public function" because in "advancing the undivided interest of his client," it performs "essentially a private function, traditionally filled by retained counsel" (internal citation and quotation omitted)).

The allegations here fall far short of plausibly satisfying this demanding standard. The provision of cable television generally—or public access channels in particular—is not a function *traditionally* provided by government. But even if it was, it is certainly

not a function that is *exclusively* provided by the state. As a plurality of this Court recognized in *Denver Area*, the public access channel operator "is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner." 518 U.S. at 761; *see also Wilcher*, 498 F.3d at 519 (provision of public access television not a "public function" for purposes of constitutional claim); *see also ACM*, 56 F.3d at 113 ("[D]etermining what programs shall be shown on a cable television system is not traditionally within the exclusive province of government at any level."). Indeed, as the dissent below noted, "it is fortunate for our liberty that it is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment." Pet. App. 26a.

While the Majority below did not apply the "public function" test, Judge Lohier in his concurrence attempted to do so. Judge Lohier wrote that "New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels." Pet. App. 21a. But this analysis improperly assumes the antecedent and is a misapplication of the "public function" test.

First, the City has not delegated to MNN a *municipal obligation* such that MNN's actions can be considered state action. *Cf. West v. Atkins*, 487 U.S. 42, 47, 54-57 (1988) (where State was constitutionally obligated to provide medical treatment to inmates, delegation of this function to private physician satisfied "public function" test). Indeed, under the applicable regulations, control of the public access channels in Manhattan has never resided with the City. Pursuant to the New York state regulations, if the

municipality fails to designate a private nonprofit entity to operate the local public access channel, the operation of such channel does not fall to the City—it defaults to the *cable franchisee*. *See* 16 NYCRR § 895.4(c)(1); *cf. Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55-56 (1999) (Pennsylvania statutory scheme did not always require state to be involved in workers' compensation matters, so there could be no delegation of a traditional and exclusive governmental function); *Jackson*, 419 U.S. at 353 (observing that statutory scheme governing provision of utility service never required the state to provide such service in the first instance, such that state could not have delegated government function to private utility operator).

Moreover, this Court has only ever applied the "public function" analysis by looking at the specific function being performed by the private entity and considering whether that specific function is "an exclusive prerogative of the sovereign." *Flagg Bros.*, 436 U.S. at 160 (warehouse sale of private property pursuant to New York Uniform Commercial Code); *see also Jackson*, 419 U.S. at 351-53 (provision of utility services); *Rendell-Baker*, 457 U.S. at 842 (education of maladjusted students); *San Francisco Arts & Athletics*, 483 U.S. at 544-45 (coordination of Olympics competition); *Blum*, 457 U.S. at 1011-12 (provision of long-term nursing care); *Terry*, 345 U.S. at 468-70 (administering an election); *Evans*, 382 U.S. at 302 (operation of a public park); *Edmonson*, 500 U.S. at 624-25 (use of peremptory challenges to create a jury); *Brentwood*, 531 U.S. at 309-10 (Thomas, J., dissenting) (organization of interscholastic sports).

The concurrence below asserted that MNN's programming is not simply "entertainment" but rather "relates to political advocacy, cultural and community affairs, New York elections, religion — *in a word, democracy*." Pet. App. 20a (emphasis added). This characterization, however poetic, is irrelevant if MNN does not carry out "*traditional*" and "*exclusive*" government functions. *See Rendell-Baker*, 457 U.S. at 842 ("the relevant question is not simply whether a private group is serving a 'public function'" but whether the function is "'traditionally the exclusive prerogative of the State'") (quoting *Jackson*, 419 U.S. at 353). The concurrence's formulation of the "public function" test is a radical departure from the way this Court has traditionally applied the analysis.

C. There Are no Allegations That the City Compelled or Coerced the Challenged Conduct, and MNN is Therefore not a State Actor Under the "Compulsion" or "Coercive Power" Test

This Court has also utilized the "compulsion" or "coercive power" test to find state action "when [the state] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004.

The focus of the "compulsion" inquiry is the challenged conduct itself and whether the state coerced, compelled, or encouraged that specific conduct. Where such conduct by the state is absent, the test is not satisfied. *See, e.g.*, *Blum*, 457 U.S. at 1005 (decisions to discharge or transfer patients from nursing homes were made by physicians and nursing home administrators, not the State, which "does not render

[the state] *responsible*" for the challenged conduct) (emphasis in original); *Flagg Bros.*, 436 U.S. at 165 (no state action even where statutory scheme "permits but does not compel" the challenged conduct, the threatened sale of bailor's goods); *Sullivan*, 526 U.S. at 52 (private insurers not subject to constitutional requirements where the state neither coerced nor encouraged the insurer's actions).

In this case, the Amended Complaint is devoid of any allegations that the City influenced, let alone encouraged, compelled or coerced, the disciplinary conduct Petitioners challenge. In fact, the Majority below conceded, as it must, that allegations of the City's involvement with MNN are limited only to the Manhattan Borough President's designation of MNN to run Manhattan's public access channels more than 25 years ago and the Manhattan Borough President's nomination of two of MNN's 13 board members. Pet. App. 8a, 14a-15a. These allegations do not come close to demonstrating influence, encouragement, or coercion of MNN's decision to take disciplinary action against the Respondents over twenty years later.

Finally, even though MNN is bound by New York's regulatory scheme governing public access television, it is well-established that the mere existence of a regulatory regime alone does not suffice to show that the challenged conduct was compelled or encouraged by the State. *See Blum*, 457 U.S. at 1008 (regulations involving level of care or transfer of patients, including specific forms and Medicaid requirements, do not "demonstrate that the State is responsible for the decision to discharge or transfer particular patients"); *Jackson*, 419 U.S. at 357 (regulations allowing termination of utility services "does not transmute a practice initiated by the utility and

approved by the commission into 'state action'" where the state "has not put its own weight on the side of the proposed practice by ordering it").

The facts alleged here simply do not warrant a finding of state action under a compulsion analysis. Indeed, the Second Circuit implicitly rejected any notion of state compulsion when it affirmed the dismissal of the City from this action.

D. MNN Does not act Jointly or Enjoy a Symbiotic Relationship With the Government

This Court has applied a state action test that looks for "joint action," a "close nexus," or a "symbiotic relationship" between the private entity and the government. This test analyzes whether the private entity operates as a "willful participant in joint activity with the State or its agents." *Brentwood*, 531 U.S. at 296. The critical factor in this analysis is the degree of coordination with (and involvement by) the state.

The Court used this analysis to find a privately-owned restaurant to be a state actor in *Burton v. Wilmington Parking Authority*, 365 U.S. 715. In *Burton*, the restaurant, which openly discriminated against African Americans, leased its space from a municipal agency, which also owned and operated an adjacent parking garage. *Id.* at 716. The Court noted that the restaurant was on publicly-owned land, the municipal agency took care of upkeep and maintenance of the restaurant facility, and the restaurant's discriminatory practices provided a direct financial benefit to the parking garage. *See id.* at 723-25. On these facts, the Court held that "[t]he

State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity." *Id.* at 725; *see also Lugar*, 457 U.S. at 941 ("a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment").

The facts of *Burton* and *Lugar* are unique, and "symbiotic relationship" inquiries have proven difficult to satisfy. Certainly "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the [Constitution]." *Sullivan*, 526 U.S. at 52 (quoting *Jackson*, 419 U.S. at 350); *see also Blum*, 457 U.S. at 1010-12 (rejecting argument that extensive subsidization and regulation of discharge and transfer of Medicaid patients causes private entity and government to be "joint participant" in challenged conduct).

In *Jackson*, the Court explained that even a "heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory" was insufficient to demonstrate a "symbiotic relationship" with the state such that the private utility's decision to terminate utility service could be deemed state action. 419 U.S. at 357-59. Similarly, in *Rendell-Baker*, the Court acknowledged that the education system at issue was heavily regulated and the private school at issue relied upon public funds for nearly all of its income, but held:

> The school, like the nursing homes [at issue in *Blum*], is not fundamentally differ-

> ent from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

Id. at 840-41; *Sullivan*, 526 U.S. at 52-54 (creation and regulation of remedial system for insurers did not transform "judgments made by private parties" into state action).

Here, the minimal connection between MNN and the City falls far short of even the funding and regulatory regime the Court has consistently found insufficient to constitute state action.

E. MNN is not Pervasively Entwined with the Government to Satisfy the Test Articulated in *Brentwood*

In *Brentwood*, this Court's most recent discussion of state action, this Court addressed whether a nominally private interscholastic athletic association was a state actor. *See* 531 U.S. at 290. The association had been "incorporated to regulate interscholastic athletic competition among public and private secondary schools" and to enforce its rules against member schools. *Id.* A private member high school sued the association under Section 1983 when the association disciplined the school for violating a recruiting rule. *See id.* at 292-93.

The Court held that the athletic association was a state actor, applying a test that examined its "entwinement" with the state. The Court considered

whether "the relevant facts show pervasive entwinement to the point of largely overlapping identity." *Id.* at 303.[11] A divided Court held that, where: the association was comprised mostly of public schools, was mostly publicly funded, run by public school officials, and its staff members were eligible for state retirement benefits, the "nominally private character of the Association [wa]s overborne by the ***pervasive entwinement*** of public institutions and public officials in its composition and workings," sufficient to find state action. *Id.* at 298 (emphasis added).

The *Brentwood* majority considered a number of factors in determining that the "entwinement" was "pervasive." *Id.* at 298. First, nearly all of the member schools in the association were public schools. *See id.* And, because each school was represented in the association by its principal or faculty member (each of whom were eligible to vote on matters of governance, rules, and leadership), the association effectively was controlled by public school officials (*i.e.*, state actors). *See id.* The Court noted:

> There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical

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[11] The *Brentwood* majority relied, in part, on *Evans* for its entwinement analysis. 531 U.S. at 296-97, 301 (citing *Evans*, 382 U.S. 296). In *Evans*, this Court found state action where a park with private trustees and the state were literally "entwined in the management or control of the park"—*i.e.*, where the state "swept, manicured, watered, patrolled, and maintained" the park. 382 U.S. at 301.

> terms. Only the 16% minority of private school memberships prevents this entwinement of the Association and the public school system from being total and their identities totally indistinguishable.

Id. at 300. Furthermore, the Tennessee Board of Education provided that its members would sit, *ex officio*, as members of the association's board. *See id.* Even the ministerial employees of the association were "treated as state employees to the extent of being eligible for membership in the state retirement system." *Id.* Finally, the Tennessee Board of Education reviewed and specifically approved the association's rules, including the challenged recruiting rule, and reserved the right to make future changes. *See id.* at 292-93.

Justice Thomas, joined by Justices Rehnquist, Scalia, and Kennedy, dissented and expressed concern that the "entwinement" inquiry was a "new theory" that "extends state-action doctrine beyond its permissible limits [and] also encroaches upon the realm of individual freedom that the doctrine was meant to protect." *Id.* at 305, 312. The *Brentwood* dissent noted that the majority did not "define 'entwinement,' and the meaning of the term is not altogether clear" from the decision. *Id.* at 312. The *Brentwood* dissent noted that "the scope of [the majority's] holding is unclear" and expressed hope that "the majority's fact-specific analysis will have little bearing beyond this case." *Id.* at 314.[12]

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[12] In the wake of *Brentwood*, Circuit courts have interpreted the "entwinement" test narrowly, often as a recasting of the existing state action tests rather than a brand new test.

The *Brentwood* dissent also applied each of this Court's established state action tests and determined that the Association *would not* have qualified as a state actor under: (i) the "public function" test, because the "organization of interscholastic sports is neither a traditional nor an exclusive public function of the States" (*id.* at 309); (ii) *Lebron*, because the association was not "created and controlled by the government for the purpose of fulfilling a government objective" (*id.* at 310 (citing *Lebron*, 513 U.S. at

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For example, courts have focused on the extent of government control of the entity, whether through control of an entity's board (*Lebron* analysis) or through the state's involvement in operational decision making ("coercive power" or "joint action" analyses). *See, e.g.*, *P.R.B.A. Corp. v. HMS Host Toll Rds., Inc.*, 808 F.3d 221, 225-26 (3d Cir. 2015) (observing that courts "must carefully analyze the entire record to determine whether [New Jersey highway authorities] were so pervasively entwined in the structure and management of" private lessee of service plazas on public highway and holding that there was no "pervasive entwinement" where there was "no personnel overlap between the [municipality] and [private entity]," "no specific [government] involvement ... in [the challenged] decision," and no "actual involvement of either entity in the management or control of the other" despite profit sharing arrangement in leases); *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 269 (2d Cir. 2014) (entwinement test considers, in addition to source of funding, whether town "appoints any portion of [private ambulance corps's] board or has any say in [private entity's] management or personnel decisions" or "played any role in the [challenged] disciplinary process"); *Hughes v. Region VII Area Agency On Aging*, 542 F.3d 169, 178-79 (6th Cir. 2008) (entwinement inquiry considered extent to which government was entwined in the management and control of nonprofit elder care facilitator); *Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22, 28 (1st Cir. 2002) (examining the extent of state regulation of school, public funding of school, how many public officials run the school to determine that "there is no entwinement").

394)); (iii) the "coercive power" test, because the State had not promulgated the regulations of those sports nor had it "encouraged or coerced the [association] in enforcing its recruiting rule [at issue]" (*id.* at 310-11); or (iv) the "symbiotic relationship" or "joint action" test, because a mere "fiscal relationship with the State is not different from that of many contractors performing services for the government" and there was no evidence that "the State profits from the [association's] decision to enforce its recruiting rule." *Id.* at 311 (quoting *Rendell-Baker*, 457 U.S. at 843).

Here, the allegations regarding MNN do not come close to supporting a plausible finding of state action through the "pervasive entwinement of public institutions and public officials." *Brentwood*, 531 U.S. at 298. Indeed, the only arguable "entwinement" occurred *more than 25 years ago* when the Manhattan Borough President designated MNN to operate Manhattan's public access channels. This is a mere historical artifact. Notably, the *Brentwood* Court emphasized that the important state of affairs to consider was the *then-current* relationship between the State and the private association. The Court noted that, even though in 1996 the State Board dropped the rule designating the association as the regulator of interscholastic high school sports in the state, the Association continued to enforce the same pre-1996 rules and the State continued to allow students to satisfy physical education requirements through activities with the Association. *See id.* at 300-02. The Court agreed with the district court in *Brentwood* "because of 'custom and practice,' 'the conduct of the parties has not materially changed' since 1996, 'the connections between [the association]

and the State [being] still pervasive and entwined.'" *Id.* at 301-02 (citation omitted). Of paramount importance to the Court was the "practical certainty ... that public officials will control operation of the Association under its bylaws." *Id.* at 301 n.4.

Here, the Manhattan Borough President's right to nominate two of MNN's 13 board members cannot possibly give rise to the "practical certainty ... that public officials will control operation of [MNN] under its bylaws." *Id.* The Amended Complaint included no allegations of any other form of entwinement. And, as both the district court and the Second Circuit correctly found, the City is not alleged to have played any role whatsoever in MNN's day-to-day management or operations. MNN is simply not a state actor under the *Brentwood* "entwinement" test.

III. THE SECOND CIRCUIT'S DECISION IS A RADICAL EXPANSION OF THE STATE ACTION DOCTRINE WITH POTENTIALLY FAR-REACHING CONSEQUENCES

The Second Circuit's ruling threatens to blur the line between governmental and private conduct, leaving courts with little guidance in determining the extent to which private entities—especially those in new and changing media landscapes—are subject to the First Amendment. Without attentive application of the state action analysis, the protections this Court has carefully developed for private conduct over the course of decades are at risk of erosion.

A. Left Undisturbed, the Second Circuit's Ruling Would Establish an Amorphous, Unworkable State Action Inquiry

The Second Circuit's determination that MNN is a state actor—at the pleading stage, no less—leaves little guidance for courts. The bounds of the inquiry are undefined: Is the threshold state action determination no longer required? Is designation by a government official or significant government regulation sufficient to find state action? Is the operation of a forum for public discourse (coupled with some level of regulation) sufficient to find state action? The holding raises other questions as well: Is state action in the "I know it when I see it" category? Can a plaintiff get past a motion to dismiss based on scant allegations of government nexus? These are questions of great concern.

The fact that an electronic forum may be analogous in some respects to a traditional public forum and is subject to some form of government regulation should not render it a *constitutional* public forum. As noted above, many social media sites share characteristics with public fora, but they are not *constitutional* public fora. For example, Twitter, Facebook, YouTube, call-in radio programming, and television shows (particularly public interest shows) share qualities with certain traditional public fora, but they are not, and should not be considered, *constitutional* public fora. This is precisely why it is necessary to perform the state action analysis first, as a threshold matter, prior to reaching the question of whether something is a constitutional public forum. Without rigorous

adherence to the state action analysis, the longstanding constitutional protections for private entities will be lost.

For example, if MNN's minimal nexus to the government is sufficient to find state action, then entities such as Time Warner, Facebook, Twitter, and National Public Radio ("**NPR**")—all of which are subject to *some* level of governmental regulation—should be concerned. Although the national public broadcasting system was created by virtue of the Public Broadcasting Act of 1967 (47 U.S.C. § 396 *et seq.*), which enabled organizations like NPR to provide their services, many "public" radio stations are not public at all. Many "public" radio stations are private, often nonprofit, entities that support their mission through listener and corporate donations.[13]

The Second Circuit decision likewise calls into question prior decisions as to whether these private entities should be treated as state actors either because they were created or supported by act of government, are heavily regulated, or bear a resemblance to state-owned broadcasters. *See, e.g.*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 564-77 (S.D.N.Y. 2018) (President Trump's Twitter account, but not Twitter itself, was public forum); *Prager Univ. v. Google LLC*, No. 17-cv-06064, 2018 WL 1471939, at *5-9 (N.D. Cal. Mar. 26, 2018) (YouTube and Google not state actors); *Shulman v. Facebook.com*, No. 17-cv-00764, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (Facebook not a constitutional state actor); *Abu-Jamal v.*

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[13] *See* American Public Media, *Organizational Structure*, https://www.americanpublicmedia.org/about/org-structure (last visited Dec. 3, 2018).

Nat'l Pub. Radio, No. 96-cv-0594, 1997 WL 527349, at *4 (D.D.C. Aug. 21, 1997), *aff'd*, 159 F.3d 635 (D.C. Cir. 1998) ("NPR ... is not a government instrumentality, and is not a state actor for First Amendment purposes.").

B. The Second Circuit's Ruling may Have Additional Ramifications

This Court has carefully circumscribed the state action analysis because calling a private entity a state actor has significant consequences that should not be taken lightly. Justice Alito raised some of these concerns in his concurring opinion in *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225 (2015), where the Court explored the implications of Amtrak being a "governmental entity" (for purposes of the delegation doctrine). *See id.* at 1231-34. For example, while Amtrak may be a government actor because of pervasive government control, Amtrak's officers have not taken an oath of office, as government officials do. *See id.* at 1235 (Alito, J., concurring). Amtrak's board composition also creates Appointments Clause concerns. *See id.* at 1238. Private entities are simply not structured in a way to address, account for, and accommodate broader constitutional concerns. *See id.* at 1234, 1240 ("while I entirely agree with the Court that Amtrak must be regarded as a federal actor for constitutional purposes [because Amtrak was "created by the government, is controlled by the government, and operates for the government's benefit"], it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution").

Moreover, as a result of the decision below, the rules, policies and actions of a private operator of a

public access channel will now be subject to the expense and distraction of recurring federal judicial review. In addition to the costly nature of defending claims in federal court, constitutional claims carry with them the threat of attorneys' fees for the prevailing party. 42 U.S.C. § 1988(b).

Allowing the Second Circuit's decision to stand would also upset the very purpose of public access television, diverting scarce resources from operations to defending potential federal lawsuits and creating new bureaucracies.[14] Operators could very likely be forced to defend in court basic administrative decisions such as scheduling changes, assigning a producer a less-than-ideal time slot, and issues that arise in the day-to-day operation of an access center. Where resources are tight, such litigation (along with compliance concerns) may prove exceedingly costly and difficult for nonprofits such as MNN. These costs would necessarily divert resources from other community programs that public access centers perform, such as educational classes and workshops that teach people valuable media skills.

Critically, reversing the Second Circuit's holding would not deprive the Respondents of a remedy. The PSC hears claims relating to the operation of public access in New York State, including claims by allegedly aggrieved producers. *See Assoc. of Cable Access*

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[14] The Second Circuit's holding calls into question whether MNN will be subject to state sunshine and open meetings laws, or whether it will need to add administrators to manage requests under the Freedom of Information Act (5 U.S.C. § 552 *et seq.*) and its state corollaries. While a city, county, or state routinely deal with such consequences, they are of great significance to a private nonprofit company that lacks the necessary budget and infrastructure to address them.

Producers v. Pub. Serv. Comm'n, 1 A.D.3d 761, 762-64 (N.Y. App. Div. 2003) (citing PSC mechanism for complaints regarding public access); *see also* 16 NYCRR § 895.4(f)(2) (allowing interested parties to "seek a ruling from the [PSC] concerning the applicability or implementation of any provision of this section or any provision of a franchise concerning PEG access upon the filing of a petition"). This type of localism inherent in the public access regime was recognized by—and critical to the decision reached by—Justice Breyer in the *Denver Area* plurality opinion. *Denver Area*, 518 U.S. at 762. The Majority's one-size-fits-all standard eviscerates locally accountable bodies that are best placed to adjudicate disputes or grievances.

Allowing the Second Circuit decision to stand would impose tremendous logistical and administrative burdens upon MNN while circumventing the key local processes this Court has considered essential for the functioning of public access television.

CONCLUSION

The judgment of the court of appeals should be reversed as to Petitioners, and left undisturbed as to the affirmance of the dismissal of the City.

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In the Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, & CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK & JESUS PAPOLETO MELENDEZ,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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GLOSSARY

CAO	Community Access Organization
MNN	Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network
PEG	Public, Educational, and Government

BRIEF FOR RESPONDENTS

INTRODUCTION

New York (unlike most states) has chosen to configure its public access television channels as public forums. The administration of a public forum is a traditional and exclusive public function. As a result, in New York, the government-selected administrator of a government-controlled public access channel is subject to the First Amendment.

First, state and local governments have discretionary authority to designate places as public forums. They do so by intentionally opening a place for individuals to speak. In a public forum, the administrator generally lacks editorial discretion, and the First Amendment protects access to the forum.

New York has structured its public access channels as public forums. By requiring them to operate on a free, first-come, first-served basis, New York precludes its channels from exercising editorial control. Most other states, however, have made a different choice; they allow public access channels to curate content. Those channels are not public forums.

Second, the Constitution governs the performance of traditional and exclusive public functions. Administering a public forum—a task limited to a sovereign or its delegee—is one such function. If a City empowers a nonprofit to serve as gatekeeper to a park or after-hours public classroom space, the First Amendment still applies. The same is true for administering the public forums that are Manhattan's public access channels.

Our position is consistent with private property rights. The City of New York—*not MNN*—owns and controls Manhattan's public access channels. The City created these channels through its franchise agreements, and the City selected MNN to administer them. Critically, the City retains complete discretion to remove MNN as administrator and replace it. MNN performs its administrative role solely at the pleasure of the City. The public access channels are therefore not private in any relevant sense.

The reach of this case is narrow. It does not address public access television where there is no government-imposed first-come, first-served rule. Nor does this case implicate the rights cable companies have in their private distribution systems, the question that divided the Court in *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996). And it does not address Internet service or content providers; because only a government can create a public forum, this case does not concern places that *private* actors hold open to the public. The *amici* principally concerned with those issues take no position on the outcome here.

Nor is this case about whether New York acted wisely in designating its public access channels as public forums. Congress provided state and local governments autonomy in structuring public access television. If the New York model succeeds, other localities may follow suit. If it fails, New York can change course. What matters is that local governments are free to decide for themselves whether to configure public access television as a public forum. Petitioners' approach, by contrast, would deny local governments this choice.

STATEMENT

A. Legal background.

1. The First Amendment broadly protects speech in public forums. Traditional public forums are those "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks." *United States* v. *Grace*, 461 U.S. 171, 177 (1983).

A government may also "designate" a public forum by "intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). A designated forum may be either "of a limited or unlimited character." *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). So long as the government chooses to keep a designated forum open, it "is bound by the same standards as apply in a traditional public forum." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983).

2. The First Amendment binds state actors. Sometimes, "an ostensibly private organization or individual" takes an action that "may be fairly treated as that of the State itself." *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Since the "Fourteenth Amendment is not [then] to be displaced," the Constitution applies to private action "fairly attributable" to the government. *Ibid.* Critical here is the "public function" analysis (*id.* at 296): "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become * * * subject to its constitutional limitations." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966).

B. Public access television.

Cable television systems "rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers." *Turner Broad. Sys. Inc.* v. *FCC* (*Turner I*), 512 U.S. 622, 627-628 (1994). Cable systems "make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers." *Id.* at 628.

The building and maintenance of a cable system relies substantially on the use of public property—and the cooperation of local government. That is, "[t]he construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property." *Turner I*, 512 U.S. at 628. A cable system "depend[s] for its very existence upon express permission from local governing authorities." *Ibid.*

Early in cable's history, local governments entered franchise agreements with cable operators. *Denver Area*, 518 U.S. at 788 (Kennedy, J.). From these earliest agreements in the late 1960s and early 1970s arose "local initiatives" that resulted in public, educational, and government access television. *Ibid.*

Beginning with the Cable Communications Policy Act of 1984, Congress regulated certain aspects of cable franchises. Congress provided that "cable operator[s] may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1). These agreements serve to "authorize the construction of a cable system over public rights-of-way" and "through easements." *Id.* § 541(a)(2).

While establishing some federal policies governing cable systems, Congress retained local autonomy with respect to public access, educational, and government television—often called PEG channels. In 1984, recognizing that "almost all recent franchise agreements" provided for public access, Congress "continued the policy of allowing cities to specify in the cable franchises" requirements for public access. H.R. Rep. No. 98-934 (1984), 1984 U.S.C.C.A.N. 4667. Congress noted that public access channels are an "electronic marketplace of ideas"—"the video equivalent of the speaker's soap box," "available to all, poor and wealthy alike." *Id.* at 30, 36.

Congress provided that local governments, in exchange for access to public rights-of-way, "may require * * * that channel capacity be designated for public, educational, or governmental use" when they extend cable franchises. 47 U.S.C. § 531(b). In *Denver Area*, the plurality explained that "the requirement to reserve capacity for public access channels is similar to the reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality's approval of a subdivision of land." 518 U.S. at 760-761.

Local governments may structure public access television in a variety of ways. While many channels are administered by "a nonprofit organization," others are run by the municipality or the cable company itself. *Denver Area*, 518 U.S. at 761 (plurality).

C. Public access in New York.

1. The State of New York has created a unique legal framework for public access television. New York, unlike most other states, requires its public ac-

cess channels to operate on a first-come, first-served basis.

State law obligates local governments to establish a public access channel when issuing cable franchises to operators with more than 36 channels. N.Y. Comp. Codes R. & Regs. (N.Y.C.C.R.R.) tit. 16, §§ 895.1(f), 895.4(b)(1). The public access channels must operate "without charge to the user." *Id.* § 895.4(c)(6).

State law specifically requires that "[c]hannel time shall be scheduled on the public access channel by the entity responsible for the administration thereof" on "a first-come, first-served, nondiscriminatory basis." 16 N.Y.C.C.R.R. § 895.4(c)(4). The cable franchisee "shall not exercise any editorial control"—unless the material is "obscenity or other content unprotected by the First Amendment." *Id.* § 895.4 (c)(8). Likewise, a "municipality shall not exercise any editorial control over any use by the public of a public access channel except as may be permitted by law." *Id.* § 895.4(c)(9).

To enable transparency, the "entity responsible for the administration of a public access channel" must record "the names and addresses of all persons using or requesting the use of any such channel," and it must make this information "available for public inspection for a minimum of two years." 16 N.Y.C.C.R.R. § 895.4(c)(10).

2. New York City established public access channels in Manhattan pursuant to this framework.

Manhattan public access television predates MNN. The first stations were established in the early 1970s. See Lisa Belkin, *Public Access TV: Behind*

the Scenes, N.Y. Times (Apr. 13, 1987). Later, New York City transferred administration of the Manhattan-area public access channels to MNN. JA22-23.[1]

The "2008 Cable Franchise Agreement by and between The City of New York and Time Warner Entertainment Company, L.P." (Franchise Agreement) provides for a minimum of six channels for public access. Franchise Agreement §§ 8.1.1, 8.1.3.[2] Time Warner agreed to carry these channels to every customer. *Id.* § 8.1.6(a).

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[1] On April 12, 1991, acting in his official capacity, Deputy Manhattan Borough President Derek Johnson incorporated MNN. See Certificate of Incorporation of Manhattan Community Access Corporation. In a press release, the City announced that "Manhattan Borough President Ruth Messinger appointed a seven-member initial board of directors." ***Messinger Announces Formation of Community Access Organization to Administer Public Access Cable Channels*** (May 16, 1991). Since then, at least two of MNN's board members are selected by the Borough President (Pet. App. 37a), who is herself a non-voting, *ex officio* member. See *MNN Staff*, MNN, perma.cc/A2VX-7QUF.

[2] New York City has posted the Franchise Agreement and the Community Access Organization (CAO) Agreement online. See perma.cc/UTP3-JW2Q (Franchise Agreement); perma.cc/63EZ-VYHY (CAO Agreement). For the Court's convenience, relevant passages are excerpted in the attached appendix.

The amended complaint cited to and quoted from both documents. See, *e.g.*, JA22-23. The courts below identified them in resolving this case. See, *e.g.*, Pet. App. 4a-5a, 37a. Petitioners cite to them, too. See, *e.g.*, Pet'rs Br. 7. They are therefore properly considered here. See *ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (courts deciding a motion to dismiss may consider "documents incorporated into the complaint by reference").

In the Franchise Agreement, the City and Time Warner agreed that the Manhattan Borough President (a New York City official) would "designate[]" a "nonprofit corporation" as the "Community Access Organization" (CAO) to administer the public access channels. Franchise Agreement § 1.18. See also *id.* § 8.1.8. The agreement between the CAO and Time Warner was part of the Franchise Agreement itself; it was "attached as Appendix C to this [Franchise] Agreement." *Id.* § 8.1.8. Moreover, the City and Time Warner agreed that the CAO must abide by "the rules and regulations of the NY [Public Service Commission], and applicable law." *Ibid.*

Through the Franchise Agreement, the City obligated Time Warner to make multi-million-dollar annual payments to the CAO. See Franchise Agreement §§ 8.2, 8.3. In this way, the City funds the CAO through mandatory payments imposed on cable operators.

The City has designated petitioner MNN as the "Community Access Organization" for Manhattan. MNN accordingly entered into the "CAO Agreement," as attached to the Franchise Agreement. See Pet. App. 37a; JA23 (identifying and quoting from CAO Agreement); App., *infra*, 24a-35a (relevant provisions of CAO Agreement).

The CAO Agreement identifies that MNN "has been designated by the Borough President as the CAO to receive such grants." CAO Agreement, at 2. It recounts that "the Franchise Agreement requires Time Warner Cable to make available * * * public access channels" and to provide "support payments and Cash Grants." *Ibid.* The CAO Agreement runs through the duration of the "Franchise Agreement,"

"*provided that* the designation of the CAO by the Borough President *remains in effect*." *Id.* § 5.1.02 (emphasis added). The CAO Agreement therefore recognizes the Manhattan Borough President's discretion to change designation of the CAO.

This agreement, moreover, details the multi-million-dollar annual payments that the City obligates Time Warner to make to MNN. First, Time Warner must pay MNN each month a per-subscriber amount: The fee began at $0.90 per subscriber, and it escalated to $1.30. CAO Agreement § 2.1.02. Additionally, the agreement requires Time Warner to make a series of cash grants to MNN, totaling $4.5 million. *Id.* § 2.2.

The CAO Agreement incorporates "all applicable local, state, and federal laws with respect to program content on the Public Access Channels" (CAO Agreement § 4.1), which includes New York's "first-come, first-served" law (16 N.Y.C.C.R.R. § 895.4 (c)(4)). Indeed, the CAO Agreement specifically obligates MNN to "maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis and to the extent required by applicable law." CAO Agreement § 3.3.01. See also Pet. App. 37a.

Reflective of the governing legal structure, MNN has long stated that its "mission" is to "ensure the ability of Manhattan residents to exercise their First Amendment rights * * * on an open and equitable basis." Pet. App. 37a.

D. Factual background.

1. Respondents DeeDee Halleck and Jesus Papoleto Melendez were longtime public access producers in Manhattan. JA24.

Halleck is Professor Emerita of Communication at the University of California at San Diego; she is the author or editor of several books about public access television, including *Hand-Held Visions: The Uses of Community Media* and *Public Broadcasting and the Public Interest*. Halleck's 1965 film *Mural on Our Street* was nominated for an Academy Award for Best Documentary Short. Halleck formed Paper Tiger Television in 1981 to produce public access content. In 1989, she received a Guggenheim Fellowship for her work in public access. Halleck advocated for the creation of MNN in the early 1990s, and, through Paper Tiger TV, she had produced content for the channel since its creation. JA24; JA38.

Melendez is a poet and playwright. He is the author of several volumes of poetry, including *Casting Long Shadows, Street Poetry & Other Poems* and *Concertos on Market Street*. His work has been featured in *The Norton Anthology of Latino Literature*. *The New York Times* identified him as one of the "founders of the Nuyorican Poetry movement," calling him a "[p]oet and [p]rophet of El Barrio." David Gonzalez, *Poet and Prophet of El Barrio May Soon Be a Pauper*, N.Y. Times (Feb. 8, 2013).

Melendez was a regular contributor of content to MNN since the mid-1990s. JA24. He "assist[ed] youth and senior citizens at the University Settlement in East Harlem in producing" programming. *Ibid.* An MNN executive, Iris Morales, had invited Melendez to join its Community Leadership Program

to train him for the creation of content for MNN. JA25.

2. The events underlying this case followed MNN's refusal to air speech concerning its cancellation of community media grants.

Using funds received from cable operators, MNN had long issued grants to promote community media. Between 1992 and 2004, MNN awarded approximately three million dollars in grants to more than 70 diverse organizations. Rick Jungers, *MNN's Community Media Grants*, J. of Alliance for Community Media (2004), perma.cc/VR5P-CJPU. Rick Jungers, then the director of community media for MNN, explained that, "[t]hrough the Community Media Grant, [MNN] works and partners with Manhattan nonprofit and grassroots organizations to use media to facilitate community dialog, foster local artistic and cultural expressions, provide local perspectives in areas of the public interest, facilitate a more media literate community, and develop a community media infrastructure." *Ibid.*

Yet, in the fall of 2008, contemporaneous with MNN executives' taking massive pay raises, MNN summarily terminated the community media grant program, citing "financial difficulties." See *The Grant Program*, Take Back MNN Campaign, perma.cc/KB8F-PQDV. See also *MNN's 4 Top Executives Earn over 600k a Year*, Take Back MNN Campaign (Jan. 6, 2015), perma.cc/3WUS-ET9W. In 2004, MNN's executive director earned $107,124 in compensation and benefits. 2004 Form 990, perma.cc/ND52-QXUB. The next five highest-paid employees at the time had compensation and benefits totaling $302,409 (an average of $60,481 each). *Ibid.* By

2009—when MNN terminated the grants—the executive director's total compensation had almost doubled, to $195,534. 2009 Form 990, perma.cc/FYT9-ZG2C. The next two highest-paid employees received total compensation of $276,402 (an average of $138,201). In 2012, the executive director's total compensation had ballooned to $255,148. 2012 Form 990, perma.cc/2H4C-YA23.[3]

Respondents and other producers objected to MNN's decision to increase compensation so sharply for nonprofit executives while simultaneously ending the community media grants. As one blog post put it after recapping the relevant salary information, "Wonder where the new cameras and community media grant program went? * * * Now you know." *MNN's Tax Forms*, Take Back MNN Campaign (May 24, 2011), perma.cc/6EQF-EZJ3. Another post decried the increase to executive compensation in 2009, "the same year MNN killed the community media grant program." *Is This What Community Media Looks Like?*, Take Back MNN Campaign (May 24, 2011), perma.cc/TJ9L-2Y6W.

3. In December 2011, respondent Halleck, along with other public access producers, attempted to attend an MNN board meeting "to urge the MNN Board to reinstate" the "community media grant program." JA25. MNN's executive director, petitioner Coughlin, informed Halleck that, notwithstanding

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[3] The nonprofit executive director's compensation has continued to skyrocket. Three years later, in 2015, his total compensation reached $406,999. 2015 Form 990, perma.cc/U27M-V7F6. Over an 11-year span, total compensation MNN paid its executive director grew nearly fourfold. MNN has not, however, reinstated its community media grant program.

MNN's bylaws that require public meetings, the board meeting was closed to the public. *Ibid.*

On February 28, 2012, Halleck emailed petitioner Coughlin, requesting permission for her and respondent Melendez to speak at the March 2012 board meeting. JA26. Coughlin agreed. *Ibid.* On March 14, 2012, Halleck brought a video camera to the meeting. *Ibid.* Once Halleck began taping, Coughlin "abruptly ended the meeting and adjourned." JA27.

That same night, Melendez was at the MNN facility to participate in the Community Leadership Program. JA25-26. After having briefly attended the board meeting to lodge his protest, he returned to the Leadership Program. JA26-27. MNN employee Morales then called Melendez out of the Leadership meeting and labeled him a "traitor" for having joined with Halleck in protesting MNN's termination of the community media grants. JA27; Pet. App. 38a. MNN subsequently dismissed Melendez from the Leadership Program. Pet. App. 38a. He surmised "that the real reason for withdrawing the invitation was because Melendez had attended the MNN board meeting, which Halleck videotaped." *Ibid.*

In July 2012, MNN held an event to celebrate the opening of the new El Barrio Firehouse Community Media Center. Pet. App. 38a. Because MNN did not allow Halleck or Melendez inside, they stood outside on the sidewalk, interviewing attendees as they entered. *Id.* at 38a-39a.

With that footage, respondents produced a 25-minute video that criticized MNN for its conduct. At one point, the screen displays the message that, "[b]ecause [Melendez] showed an interest in attend-

ing the MNN board meeting, he was removed from the class and harshly reprimanded." *The 1% Visits El Barrio; Whose Community* (2:50). In the video, Melendez explains that MNN took adverse action against him because he had "issues against the board of directors" (*id.* at 17:36-17:57)—the "issues" were respondents' complaints regarding the community media grants.

During the filming, Joseph Figueroa, Morales' boyfriend, arrived. Pet. App. 39a. "When Halleck asked him to comment about public access, Figueroa responded, 'Don't f--- with me.'" *Ibid.* "When Melendez responded, 'Hey f--- you,' Figueroa rushed at him." *Ibid.* Security had to hold Figueroa back from striking Melendez; MNN nonetheless allowed Figueroa to attend the event. JA30.[4]

Following this incident, Melendez made a comment regarding race and class, noting that the security guard precluding him from entering was a minority. MNN subsequently argued that this comment amounts to an aggravated threat:

> You know what's funny? I got to wait for my people to stop working in this building so that I can gain access to it. Do you understand what I'm saying? Our people, our people, people of color, are in control of this building and I have to wait until they are fired, or they retire, or someone kills them so that I can come and have access to the facili-

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[4] Petitioners do not explain how their treatment of Figueroa—who was videotaped assaulting Melendez but received no suspension (JA30-32)—comports with "MNN's zero tolerance policy on harassment." Pet'rs Br. 10.

> ty here. Because I am being locked out by people of color. There's irony for you.

Pet. App. 39a.

Halleck and Melendez submitted this video to air on MNN. Pet. App. 5a-6a. MNN ran it once in October 2012, but shortly thereafter banned it from the network. *Id.* at 6a. MNN maintains that Melendez's comment that he could not access the building until the guards at the door are "fired, or they retire, or someone kills them" constituted an aggravated threat to MNN staff. *Ibid.*[5]

Petitioners suspended Halleck from submitting content to MNN for one year. Pet. App. 7a.[6] While Halleck's suspension has expired, she is still not permitted to air *The 1% Visits El Barrio* or any other program featuring Melendez. *Id.* at 40a.

MNN suspended Melendez for life. Pet. App. 7a. MNN maintains that it will never again allow Melendez to submit content to the public access channel in his community. *Ibid.*

E. Proceedings below.

Respondents filed suit, seeking injunctive relief.[7] They request an order restoring their right to place

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[5] During the motion hearing, the district court expressed skepticism that Melendez committed harassment: "I've looked at the video. * * * What's so threatening about it?" JA61.

[6] Petitioners contend that, at a chance meeting in July 2013, Melendez "threatened and pushed" Coughlin. Pet. App. 40a. Respondents allege that Coughlin fabricated the alleged physical aggression. JA34.

[7] Although the complaint included a generic claim for damages, respondents subsequently and categorically relinquished

content on Manhattan's public access channels. Respondents allege that petitioners—MNN and three of its employees—engaged in viewpoint discrimination by banishing them. Pet. App. 2a-3a. Respondents assert that MNN's stated reason for issuing their bans is pretext. JA32.

1. The district court dismissed the action. Pet. App. 34a-53a. It agreed "that the regulation of free speech in a public forum is 'a traditional and exclusive public function.'" *Id.* at 45a. The district court therefore concluded that the case turns on whether MNN administers a designated public forum. *Id.* at 46a.

The district court viewed public access channels broadly. Pet. App. 46a-50a. In addressing the legal status of the forum, the district court did not focus on the New York state law requiring first-come, first-served access. Instead, considering public access channels generally, the court observed that whether *all* "public access channels are public fora" "is certainly a close call." *Id.* at 51a. Ultimately, the court concluded that respondents "cannot establish that MNN was operating a public forum." *Id.* at 53a.

2. The court of appeals reversed, holding that "the public access TV channels *in Manhattan* are public forums." Pet. App. 3a (emphasis added). The court focused expressly on the New York law obligating "first-come, first-served nondiscriminatory" access to the channels. *Id.* at 4a. The court concluded that the specific overlay of federal, state, and munic-

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that request: "Plaintiffs withdraw their claim for monetary damages." D. Ct. Dkt. No. 43, at 25.

ipal law rendered Manhattan's public access channels a public forum. *Id.* at 13a-14a.

Because MNN was designated by the City of New York to administer the public forum, its conduct in doing so qualifies as state action. Pet. App. 14a-15a. In particular, the court explained that "[t]he employees of MNN are not interlopers in a public forum; they are exercising precisely the authority to administer such a forum conferred on them by a senior municipal official." *Id.* at 15a.

Concurring, Judge Lohier explained that "New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels." Pet. App. 21a. He observed that "MNN's public access channels largely offer 'the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet.'" *Id.* at 20a.

Judge Jacobs dissented in part. Pet. App. 22a-33a. Approaching public access as a whole, he reasoned that a cable channel is not a "power[] traditionally exclusively reserved to the State," nor is it a "function[] of sovereignty." *Id.* at 25a. He did not address New York's first-come, first-served requirement.

SUMMARY OF ARGUMENT

New York (unlike most other states) has chosen to designate its public access channels as public forums. Administering a public forum is a traditional and exclusive public function. Respondents have

thus adequately pleaded that petitioners' challenged conduct was state action.[8]

I.A. People enjoy substantial free speech rights in public forums, including places so designated by state and local governments.

A public forum cannot be created by a private party or by government inaction. Rather, to designate a public forum, the *government* must *intentionally open* the forum for use by the public to speak. The administrator of such a forum generally lacks editorial discretion; if the speaker comports with the rules established for the forum, he or she has a right to speak.

By contrast, where the government creates a structure of *selective* access, there is no public forum. In that kind of place, the administrator retains editorial discretion to choose who will be permitted to speak.

B. The State of New York has chosen to designate its public access channels as public forums. State law requires those channels to operate on a first-come, first-served basis. They are free of charge and free of editorial control. New York has thus made its public access channels generally open to the public.

New York law is unique. Most other states have made different choices; they do not impose a first-come, first-served rule on public access channels. In those jurisdictions, public access administrators may

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[8] Because this case arises on a Rule 12(b)(6) motion to dismiss, respondents' factual allegations are assumed true. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2005 (2017).

exercise editorial control. These "selective access" regimes are not public forums.

C. Manhattan's public access channels are owned by the City, not MNN.

Petitioners assert, without explanation, that they own the relevant forum. They therefore contend that our argument requires accepting the premise that a public forum may be established on private property.

Petitioners are mistaken. The City—*not MNN*—owns the relevant rights. The City's contracts with the cable operators created the public access channels in Manhattan. Those contracts entitle the City to select the channels' administrator. The City chose petitioner MNN. But the City has express authority to remove MNN and replace it with another organization. MNN's tenure as administrator of Manhattan's public access channels is thus at the pleasure of the City. Because the City ultimately controls the public access channels, it was proper for the government to designate them as public forums.

The issues here are different from those in *Denver Area*. In that case, there was a conflict between the cable operator's rights to its private cable distribution network and the programmers' rights to place content onto that network. Because of that conflict, the opinions considered whether the *cable distribution system* was a public forum.

Here, there is no claim by or against a cable operator. As all agree—including the principal association that advocates on behalf of cable operators—the rights of cable operators are not at issue. The question is whether the *public access channels* are public forums. In New York, they are.

D. Congress has allowed state and local governments to make various choices about how to configure public access channels. New York has chosen to create venues for the exercise of First Amendment rights—a decision that enhances its citizens' freedoms. Petitioners, by contrast, seek a one-size-fits-all rule that would shackle local authority.

The question posed in this case is not whether New York's choice to structure public access television as a public forum is good policy. That is a decision for New York to make. Indeed, if New York ever dislikes the consequences of its decision, it can change course.

In any event, the First Amendment allows substantial leeway in the design of neutral time, place, and manner restrictions. For instance, although the Court has long held that school facilities opened to the public qualify as public forums, there has been no judicial micromanagement of schoolhouse meeting times. Instead, courts simply (and properly) enforce the rule that schools may not discriminate against disfavored groups and messages. The same is also true for public access channels that the government designates as public forums.

E. As several *amici* underscore, the issue posed here is narrow. This case does not address public access television in states that have made different choices. It does not implicate the rights of cable operators. And it says nothing about the Internet.

If a government did attempt to designate a public forum on private property, that would raise complex questions regarding the Takings Clause and compelled speech. But, because Manhattan's public access channels are owned and controlled by the City,

those issues are not present here. Indeed, petitioners have never raised them.

II.A. "Public functions" are a limited category of activities that states have traditionally and exclusively performed. They reflect an exercise of sovereignty. When a state delegates a public function to a nominally private entity, the Constitution continues to apply.

B. The administration of a public forum qualifies as a public function. The Court adopted this rule in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), and that holding remains correct. Public forums are created by government action. Once they are created, only the government has the authority to administer them. Absent a delegation of authority by the state, a private entity lacks authority to serve as gatekeeper to a public forum.

C. This conclusion precludes circumvention of the First Amendment. If a city delegates administration of a public park to a nonprofit, the First Amendment still governs the approval of demonstration permits. Likewise, a school district cannot evade *Good News Club* by designating a private entity to administer school facilities.

ARGUMENT

I. New York has chosen to designate its public access channels as public forums.

New York—unlike most other states—has designated its public access channels as public forums. It has done so by adopting a first-come, first-served rule that precludes the channels from exercising editorial discretion.

New York's designation of its public access channels as public forums accords with the underlying property rights. Municipalities create the public access channels in that state, and they determine who administers them. Relevant here, while New York City has chosen MNN to administer Manhattan's public access channels, the City retains sole discretion to remove MNN. MNN is wrong to assert that it possesses some ownership interest in the channels.

To be clear, only intentional *government* action can create a public forum. Public forums are not established by private parties or through government inaction. And constitutional safeguards would apply if a government sought to impose a public forum on private property. That is why several *amici* concerned with the potential application of the First Amendment to private businesses are neutral as to the outcome of this narrow dispute. See, *e.g.*, Internet Ass'n Br. 15-21 (arguing against application of the First Amendment to private Internet companies); EFF Br. 10-18 (describing First Amendment interests of private entities); NCTA Br. 4-17 (advocating for cable operators' First Amendment rights); Chamber Br. 6-18 (arguing that privately-owned forums are not subject to the First Amendment). As these briefs confirm, respondents' position is fully compatible with protecting businesses' private property rights.

A. State and local governments possess discretion to designate public forums.

Public forums are "places which by long tradition *or by government fiat* have been devoted to assembly and debate"; in these places, "the rights of the state

to limit expressive activity are sharply circumscribed." *Perry*, 460 U.S. at 45 (emphasis added).

1. Traditional public forums are places like "streets and parks" that "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry*, 460 U.S. at 45 (quoting *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J.)).

In a traditional public forum, "[r]easonable time, place, and manner restrictions are allowed," but "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009). And "restrictions based on viewpoint are prohibited." *Ibid.*

2. "In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public." *Cornelius*, 473 U.S. at 802. A designated forum may be either "of a limited or unlimited character." *Krishna Consciousness*, 505 U.S. at 678. The designated forum is an unlimited one if it is designated "for use by the public at large for assembly and speech," and it is a limited forum if it is designated "for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802.

School facilities purposefully opened to the public often qualify as public forums. See *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). So do public university

programs open to at least some range of speakers. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Widmar* v. *Vincent*, 454 U.S. 263 (1981). The municipal theater in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975), was likewise a public forum.

If the forum is unlimited, its regulation "is subject to the same limitations as that governing a traditional public forum." *Krishna Consciousness*, 505 U.S. at 678. While "a state is not required to indefinitely retain the open character of" a designated public forum, the forum "is bound by the same standards as apply in a traditional public forum" so long as it remains open. *Perry*, 460 U.S. at 46.

Alternatively, a government may designate a "limited" public forum by opening a forum "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Summum*, 555 U.S. at 470. In these places, "the constitutional right of access" "extend[s] only to other entities of similar character" to those allowed to access the forum. *Perry*, 460 U.S. at 48. In such a limited public forum, "[a]ny access barrier must be reasonable and viewpoint neutral." *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 679 (2010).

"The government does not create a public forum by inaction." *Cornelius*, 473 U.S. at 802. "Designated public fora * * * are created by *purposeful* governmental action." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 677 (1998) (emphasis added).

3. In assessing whether a government has designated a place as a public forum, the Court considers the forum's structure and nature.

Structure. For a forum to qualify as a "designated public forum, whether of a limited or unlimited character," a government must have "opened [the forum] for expressive activity by part or all of the public." *Krishna Consciousness*, 505 U.S. at 678. That is, the forum must be "generally open" to at least some class of speakers. *Widmar*, 454 U.S. at 267. This is often referred to as a structure of "general access." *Cornelius*, 473 U.S. at 803.

In a public forum, the administrator cannot impose editorial control beyond the structure of the forum itself. Because an unlimited public forum lacks any structural, state-imposed limitations, the administrator cannot exercise any editorial control. See *Summum*, 555 U.S. at 469-470. In a limited public forum, the administrator may restrict the range of speakers or the range of topics to those within the scope of the limited forum, but the administrator cannot exercise additional control. *Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, * * * the State must respect the lawful boundaries it has itself set.").

By contrast, a "selective access" regime is not a public forum. *Perry*, 460 U.S. at 47. "A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Arkansas Educ. Television*, 523 U.S. at 679. Instead, where a speaker must first "obtain permission," the government has editorial control. *Cornelius*, 473 U.S. at 804. A license plate is not a public forum, for example, because "the State exercises final authority over each specialty license plate design." *Walker* v. *Texas*

Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2251 (2015).

Nature. The Court also considers "the nature of the property and its compatibility with expressive activity" to help "discern the government's intent." *Cornelius*, 473 U.S. at 802. A public forum is typically a place that has as "a principal purpose * * * the free exchange of ideas." *Id.* at 800.

The Court has repeatedly confirmed that a public forum need not be physical space. It may be "a place *or channel of communication.*" *Cornelius*, 473 U.S. at 802 (emphasis added). A public forum includes communication channels that are more "metaphysical than in a spatial or geographic sense." *Rosenberger*, 515 U.S. at 830. The "same principles" of public forum analysis are thus "applicable" to a student activity fund (*ibid.*), a school mail system (*Perry*, 460 U.S. at 46-47), the Combined Federal Campaign (*Cornelius*, 473 U.S. at 801), and advertising space on city buses (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 300 (1974)).

B. New York—unlike most other states—has designated its public access channels as public forums.

1. New York has chosen to designate its public access channels as public forums.

Structure. New York law structures its public access television channels as "generally open" to the public.

State law mandates that New York's public access channels operate on a "first-come, first-served" basis, so administrators are not granted editorial control. 16 N.Y.C.C.R.R. § 895.4(c)(4). Moreover,

"[c]hannel time for PEG access programming shall be without charge to the user." *Id.* § 895.4(c)(6). To make the public aware of this forum, petitioners must periodically transmit messages "to the general public of the opportunity to use such channel." *Id.* § 895.4(c)(3).

A "municipality shall not exercise any editorial control over any use by the public of a public access channel except as may be permitted by law." 16 N.Y.C.C.R.R. § 895.4(c)(9). Nor can anyone else exercise "any editorial control"—unless the "content" is "unprotected by the First Amendment." *Id.* § 895.4(c)(8).

In the district court, petitioners admitted that New York's "nondiscriminatory regulation" precludes it from engaging in any "viewpoint-based discrimination." JA60. MNN acknowledges that state law precludes it from banning content because it "criticized MNN." JA59. This is the hallmark of a public forum: New York law opens the state's public access television platform to the public, and, as MNN concedes, state law *forbids* it from exercising additional editorial control.[9]

New York has thus purposefully "opened" its public access channels "for expressive activity by part or all of the public." *Krishna Consciousness*, 505 U.S. at 678. MNN is "generally available" to the public. *Widmar*, 454 U.S. at 264. MNN's own mission statement recognizes that MNN exists to "ensure the

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[9] State law bars MNN from editorial discretion, a conclusion that MNN accepts. JA59-60. MNN is therefore unlike traditional news stations, where "editorial staff[s]" exercise "discretion." *Arkansas Educ. Television*, 523 U.S. at 673.

ability of Manhattan residents to exercise their First Amendment rights * * * on an open and equitable basis." Pet. App. 37a.

In fact, MNN has previously taken the position that it is "a First Amendment forum." See *Denver Area* JA238 (Nos. 95-124 & 95-227). In comments to the FCC, MNN urged "the Commission not to jeopardize the integrity of public access as a First Amendment forum." *Ibid.* See also *id.* at JA235 (identifying MNN's mission as tethered to Manhattan residents' First Amendment rights).

This is analogous to school districts or public universities that have opened their "facilities for use * * * by community groups for a wide variety of social, civic, and recreational purposes." *Rosenberger*, 515 U.S. at 830. See also *Widmar*, 454 U.S. at 267 ("[T]he University has created a forum generally open for use by student groups."). Just as those facilities qualify as public forums once opened to the public, so too does New York's public access television.

Nature. The nature of public access television is entirely consistent with New York's choice to designate it as a public forum.

In *Widmar*, this Court concluded "that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum," partly because "[t]he college classroom" and its "surrounding environs" are "peculiarly 'the marketplace of ideas.'" 454 U.S. at 267 n.5.

Public access channels like New York's are likewise "marketplaces of ideas." Congress itself has identified that public access channels are an "electronic marketplace of ideas"—"the video equivalent

of the speaker's soap box," "available to all, poor and wealthy alike." H.R. Rep. No. 98-934, at 30, 36 (1984). Indeed, MNN's "programming relates to political advocacy, cultural and community affairs, New York elections, religion—in a word, democracy." Pet. App. 20a (Lohier, J., concurring). Like the theater in *Southeastern Promotions*, a public access channel is "designed for and dedicated to expressive activities." 420 U.S. at 555.

What is more, the Court has previously observed that "[t]here can be no disagreement" on the conclusion that "[c]able programmers * * * engage in and transmit speech." *Turner I*, 512 U.S. at 636. Producers of public access programming, including respondents, likewise "engage in and transmit speech" when they use the forum of public access television.

One final point: We have repeatedly stated that New York's free, first-come, first-served policy is what renders public access channels in that state public forums. See, *e.g.*, Opp. 1-2, 8, 14-19, 24. We explained that petitioners' inability to "assert editorial control over the content aired" is "the calling card of a public forum." *Id.* at 24. Petitioners do not engage our argument; indeed, petitioners disregard New York's first-come, first-served law entirely. Petitioners insist on viewing the relevant question as whether *all* public access channels are a public forum. See Pet'rs Br. 24-37.[10] That is simply not our argument.

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[10] While doing so, petitioners repeatedly suggest that *we* advance a "per se" rule (Pet'rs Br. 5, 20, 34, 35) or "categorical" approach (*id.* at 20, 36). That is incorrect. Our position is governed by the unique features of New York law.

2. New York's free, first-come, first-served, no-editorial-control approach to public access is unusual. To our knowledge, only Hawaii and Rhode Island have comparable first-come, first-served laws. See Haw. Admin. Code § 16-131-32; 815 R.I. Admin. Code § 10-05-1.14.1.

The vast majority of states have no similar requirement.[11] Highlighting that this is a matter of discretion for local governments—and a choice with consequences—Minnesota expressly authorizes municipalities to determine whether or not public access channels must be "available for use by the general public on a first-come, first-served, nondiscriminatory basis." Minn. Stat. Ann. § 238.084(1)(z).

Where state or local governments have not imposed a first-come, first-served law with respect to public access television, the administrator of the station may choose to exercise editorial discretion in selecting the content to air. There is no federal law that obligates public access channels to operate on a first-come, first-served basis.

It is little surprise, therefore, that public access channels outside New York *do* engage in editorial cu-

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[11] See, *e.g.*, Ariz. Rev. Stat. Ann. § 9-506(D)(1); Cal. Pub. Util. Code § 5870; Conn. Agencies Regs. § 16-331a-2; Fla. Stat. Ann. § 610.109; Idaho Code Ann. § 50-3010; Ind. Code Ann. § 8-1-34-25; Iowa Code Ann. § 477A.6; Kan. Stat. Ann. § 12-2023; La. Stat. Ann. § 45:1369; Me. Rev. St. Ann. tit. 30-A, § 3010; Mo. Ann. Stat. § 67.2703; Nev. Rev. Stat. § 711.810; N.H. Rev. Stat. Ann. § 53-C:3-a; N.J. Admin. Code § 14:18-15.4; N.C. Gen. Stat. Ann. § 66-357; Ohio Rev. Code Ann. § 1332.30; Okla. Stat. Ann. tit. 11, § 22-107.1; Tenn. Code Ann. § 7-59-309(a); Tex. Util. Code Ann. § 66.009; Va. Code Ann. § 15.2-2108.22; W. Va. Code Ann. § 24D-1-9.

ration. California, for example, lacks a statewide first-come, first-served law. See Cal. Pub. Util. Code § 5870. Consistent with state law, the Los Angeles Cable Television Access Corporation airs only "the 'Best Of' Public Access programming in the City of Los Angeles." *Public Access Guidelines*, L.A. Cable Television Access Corp., 1, perma.cc/JE7W-P87H. An "advisory committee" selects the content deemed "Best Of" on "a quarterly basis." *Ibid.* The content will run only if the committee makes this editorial decision. *Ibid.*[12]

That sort of structure is not "generally open" to the public. *Widmar*, 454 U.S. at 267. Rather, it is the sort of "selective access" regime where a would-be speaker must first ask for "permission." *Perry*, 460 U.S. at 47.

Congress let state and local governments make various choices regarding public access television. One of those choices is whether to render those channels public forums. Some states—New York, Rhode Island, and Hawaii—have done so by intentionally opening the channels to the public. Most other states have not. These different choices warrant respect.

3. Because it makes no difference here whether the public forum is considered limited or unlimited,

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[12] Petitioners point to West Hollywood Public Access. See Cert. Reply 5 n.6. That entity is operated by the City of West Hollywood, so it is necessarily a state actor. See *Public Access Television*, City of W. Hollywood, perma.cc/4ZWK-ULEH. In any event, what matters for the public forum analysis is whether a *government* has chosen to render a forum one that is open to the public. *Arkansas Educ. Television*, 523 U.S. at 677. When a local government makes this choice, it has consequences.

the Court need not address the issue. See *Good News Club*, 533 U.S. at 106 (reserving whether forum is limited or unlimited).

Assuming for the sake of argument that Manhattan public access channels are limited to "certain groups" (*Rosenberger*, 515 U.S. at 829), respondents are within the class of individuals for whom the forum is open. Respondents previously submitted content to MNN, and MNN invited Melendez to participate in a class to train him to provide video for airing. See JA24-26.

Respondents moreover allege that petitioners engaged in viewpoint discrimination: Petitioners disliked the viewpoint respondents displayed in *The 1% Visits El Barrio* and banished them from the public forum for that reason. See JA26-35. In a limited public forum, "viewpoint discrimination * * * is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger*, 515 U.S. at 830.

If the Court does reach the issue, the first-come, first-served requirement creates an unlimited public forum. New York law provides "for use by the public at large for assembly and speech," regardless of the identity of the speaker or the nature of the subject. *Cornelius*, 473 U.S. at 802. But whether the designated public forum is deemed limited or unlimited, respondents' viewpoint discrimination claim remains equally viable.

C. New York's choice is consistent with the underlying property rights.

New York's decision to designate its public access channels as public forums is consistent with the un-

derlying property rights because New York owns and controls the relevant rights.

1. New York City owns and controls its public access channels.

a. Petitioners assert, without explanation, that this case involves "privately-owned and controlled fora." Pet'rs Br. 30-34 (capitalization omitted). That is flatly wrong. MNN serves as administrator of Manhattan's public access channels solely at the pleasure of New York City. The City retains complete discretion to remove MNN as administrator and replace it with another entity. It is the City—*not MNN*—that owns the relevant rights. Because of this public ownership, petitioners' arguments regarding the intersection of public forums and private property (*ibid.*) are not relevant to this case.

Cable systems involve three principal kinds of property rights, only the third of which is relevant here:

i. Cable distribution network rights. Cable operators own their cable distribution networks, which physically transmit cable signals to subscribers' homes and offices. See *Turner I*, 512 U.S. at 628-629. These networks are largely built on public rights-of-way and easements. *Ibid.* Cable operators have property and speech rights with respect to their distribution networks. Those rights were at stake in *Denver Area*, but they are not at issue here.

ii. Content rights. Individual content is typically owned by the producers who create it. There is no dispute regarding content rights in this case.

iii. Content placement rights. This case involves the right to place content on a particular channel.

That right is what gives a cable programmer access to and control over a cable channel.

Cable operators often reach agreements with cable programmers (like ESPN) that provide the programmer access to a particular channel of the cable system. *Turner I*, 512 U.S. at 629. After that relationship is created, the "cable system" becomes a "conduit," "transmitting" the content selected by the programmer "on a continuous and unedited basis to subscribers." *Ibid.*

As required by state law, New York City created public access channels when it entered into franchise agreements with Manhattan-area cable operators. The City's Franchise Agreement with Time Warner, for example, creates at least six public access channels. See, e.g., Franchise Agreement §§ 8.1.1, 8.1.3. The City continues to own and control these channels.[13]

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[13] For purposes of this case, it does not matter if a cable programmer is deemed to "own" a cable channel outright—or to have a long-term interest equivalent to a lease. In *Southeastern Promotions*, Chattanooga had a "long-term lease" to the "privately owned" Tivoli theater. 420 U.S. at 547. The lease gave Chattanooga a content placement right; that is, Chattanooga held the right to select what content would be displayed in the theater, even though it did not own the theater itself. See *ibid.* The Court nonetheless concluded that the theater was a public forum to which the First Amendment applied. *Id.* at 553-555. See *Cornelius*, 473 U.S. at 803. In *Denver Area*, Justice Thomas identified *Southeastern Promotions* as supporting the contention that "[o]ur public forum cases have involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum." 518 U.S. at 828.

Although state law obligated the City to create the public access channels, it afforded the City discretion as to how to administer them. In particular, the City could choose between running the channels itself—or assigning that administrative function to a third party. See 16 N.Y.C.C.R.R. § 895.4(c)(1).[14]

In accord with this framework, several municipalities in New York have chosen to administer the public access channels themselves. Buffalo Public Access, for example, is "a division of the City of Buffalo Office of Telecommunications"; "[t]he Office is responsible for programming on Channel 20," Buffalo's public access station. See perma.cc/3ZN7-V8LB. Municipalities in Brighton (perma.cc/P4EV-YDR5), Irondequoit (perma.cc/USM7-C7DW), Rye (perma.cc/33H6-6227), Scarsdale (perma.cc/9LU3-W8V7), and White Plains (perma.cc/4WKL-38UU) have likewise decided to run their public access channels themselves.

As we have said, per state law, New York's public access channels must operate on a first-come, first-served basis. See pages 26-29, *supra*. Had New York City chosen to run its public access channels itself—

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[14] To resist the conclusion that the City owns the relevant right, petitioners cite 16 N.Y.C.C.R.R. § 895.4(c)(1) and argue that, "under the applicable regulations, control of the public access channels in Manhattan has never resided with the City." Pet'rs Br. 44-45. Not so. Section 895.4(c)(1) establishes that the cable operator is the default administrator of public access if the municipality fails to designate another "entity." This imposes an obligation on the cable operator, not a limitation on the municipality. The municipality retains complete control—it can designate *any* entity, including *itself*, to operate the public access channels. The several municipalities in New York that *do* administer their public access channels directly prove the point.

like several other municipalities in New York do—they would plainly qualify as public forums.

New York instead chose to delegate the administrative function to MNN. That delegation does not affect the public forum analysis because there was no transfer of ownership to MNN. The City—*not MNN*—continues to own the essential rights to the channels. This is proven by the fact that the City retains discretion to remove MNN as administrator and substitute a new entity to run the public access channels. In total, MNN is administering a publicly-owned right to public access channels.

In the City's Franchise Agreement with Time Warner, the City determined that it would choose a "Community Access Organization" to administer the public access channels. Franchise Agreement §§ 1.18, 8.1.8. The CAO is expressly defined as "the nonprofit corporation that has been designated by the Borough President." *Id.* § 1.18. The City—and the City alone—selects the administrator for the public access channels.

The first clause in the CAO Agreement between MNN and Time Warner recognizes that their relationship exists solely because MNN was "designated by the Borough President of Manhattan" as the CAO. CAO Agreement, at 2. Per the CAO Agreement, MNN's function is to "administer and manage" the placement of content on the public access channels. *Id.* § 3.1. Nothing suggests that MNN owns the right to place content on the channels; it has been assigned administration and management only.

Critically, in identifying the length of their agreement, MNN and Time Warner agreed that their relationship is contingent on "the designation of the

CAO by the Borough President remain[ing] in effect." CAO Agreement § 5.1.02. If that designation does not "remain in effect," then MNN's ability to deliver content via Time Warner's cable system ceases. *Ibid.* This agreement—which was created via negotiations between the City and Time Warner, and which was attached to the Franchise Agreement (see Franchise Agreement § 8.3)—confirms that the City has authority to remove MNN as the CAO. MNN is itself party to this agreement. The City is under no obligation whatever to maintain MNN as the CAO for Manhattan.

History illustrates the Manhattan Borough President's authority. According to MNN's own account, MNN "assumed administrative responsibility for the public access channels in September 1992 after twenty years of administration by the local cable operators." *Denver Area* JA235. See also Pet'rs Br. 3 ("[T]he Manhattan Bureau President chose MNN to replace Time Warner."). That is, the City changed administrators to MNN. MNN currently has what it identifies as "administrative responsibility" (not ownership) because of the City's decision. The City has the authority to make a similar change in the future.

In sum, the City controls Manhattan's public access channels. It created those channels through its agreements with the cable operators. And it selects who administers those channels. While it has chosen MNN for now, the City may change administrators, a power it has previously exercised. This all reflects

that the City—*not MNN*—owns and controls the rights essential to the public access channels.[15]

b. This conclusion is independent of the issue that engaged the Court in *Denver Area*—the extent and nature of the cable operators' property and First Amendment interests in their cable distribution networks.

Those issues were present in *Denver Area* because there was a *conflict* between the cable operators' rights to control their distribution network and the programmers' content placement rights. Justice Thomas, in his partial dissent, was of the view that, "*when there is a conflict*, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion." 518 U.S. at 816 (emphasis added).

Here, there is no such conflict. There is no claim by or against a cable operator. This case does not therefore pit the cable programmer's rights against the cable distributor's rights.

Put differently, the issue in this case is whether a New York public access channel can censor content that producers seek to air. The issue in *Denver Area*, by contrast, was whether the *cable operator* could censor content. These are materially distinct inquiries because they involve different underlying rights.

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[15] If the City transferred the public access channels to another entity, the new administrator may not be able to use the name "Manhattan Neighborhood Network" or other intellectual property that MNN might claim to own. But the public forum is not the channels' name. It is the public access channels themselves—which the City controls.

The *amicus* briefs confirm this point. NCTA, which was a party in *Denver Area*, represents members who own and operate "cable television systems serving nearly 80 percent of the nation's cable television customers." NCTA Br. 1. NCTA advances Justice Thomas' position from *Denver Area*. *Id.* at 4-17. But NCTA expressly recognizes that "whether the PEG-channel requirement is itself constitutional is not directly before this Court." *Id.* at 3. For that reason, NCTA—the voice of the cable industry—does not oppose a ruling in respondents' favor. *Id.* at 2.

In fact, our position is consistent with the views expressed by both Justice Kennedy and Justice Thomas in *Denver Area*. Justice Kennedy (joined by Justice Ginsburg) recognized that when a public access channel is "open to all comers"—as New York's are—then the "[p]ublic access channels" are "a designated public forum." 518 U.S. at 791.

Justice Thomas' views in *Denver Area* also support our position. Justice Thomas noted that "[i]t is no doubt true that once programmers have been given, rightly or wrongly, the ability to speak on access channels, the First Amendment continues to protect programmers from certain Government intrusions." 518 U.S. at 820. In view of the franchise agreements, the public access channels certainly exist. If New York has structured these channels as a public forum, the First Amendment applies.

The *Denver Area* dissent's discussion of the public forum doctrine (518 U.S. at 826-831) is also consistent with our argument. Because *Denver Area* addressed a conflict between the cable network distribution right and the programmers' content placement right, Justice Thomas focused on whether the

cable network itself is a public forum. The dissent began with the premise that "[c]able systems are not public property," and it continued to reason that governments generally may not designate public forums on private property. *Id.* at 827-829.

But this case does not require the Court to decide whether the *cable distribution network* is itself a public forum. That is not our argument. The only issue is whether local governments can configure the *public access channel* as a public forum. Because that right is publicly held, the private property analysis of the *Denver Area* dissent is inapplicable.

Local governments have the autonomy to create a public access station that is a designated public forum—the television equivalent of a public park or sidewalk. It would be a surprising affront to localism if state and municipal governments *lacked* this power. Recognizing that this authority exists—and that New York has exercised that power here—is all that our argument requires.

2. Alternatively, there is a public easement.

If, contrary to our principal position, MNN owns some relevant right, that right is subject to an easement in favor of the public (on the first-come, first-served basis defined by state law). Likewise, if the cable operators' interests were at issue here, they would also be subject to easements.[16]

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[16] MNN—one of the Nation's largest administrators of public access television—cannot seriously dispute that there is, at the very least, a public easement that authorizes public access television. Otherwise, public access television itself would lack legal foundation.

a. In *Denver Area*, at least five Justices agreed that the legal requirements that give rise to public access channels create a form of a public easement. The three-Justice plurality explained that "the requirement to reserve capacity for public access channels is similar to the reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality's approval of a subdivision of land." 518 U.S. at 760-761. And Justice Kennedy (joined by Justice Ginsburg) explained that a cable franchise agreement "create[s] a right of access equivalent to an easement in land." *Id.* at 794.

Justice Thomas' dissent also recognized that a public forum can exist on property in which a government has a legally-protected interest, such as an easement. The dissent noted "the common practice of formally dedicating land for streets and parks when subdividing real estate for developments." 518 U.S. at 827. "Such dedications may or may not transfer title, but they at least create enforceable public easements in the dedicated land." *Ibid.* As Justice Thomas concluded, "[t]o the extent that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum." *Id.* at 828.[17]

There was thus common ground in *Denver Area* that, in appropriate circumstances, the government's

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[17] Lower courts have properly applied public forum analysis to sidewalks that are privately-owned but subject to a public easement. See *First Unitarian Church* v. *Salt Lake City Corp.*, 308 F.3d 1114, 1123 (10th Cir. 2002); *Venetian Casino Resort, L.L.C.* v. *Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 943 (9th Cir. 2001).

control over an easement can be a basis for a public forum.

b. If (contrary to fact) MNN owns the relevant rights relating to Manhattan's public access channels, MNN's ownership is subject to an easement for public access.

As we have said, whatever interest MNN holds flows from the City. The City designated MNN as the administrator of Manhattan's public access channels, and MNN is legally obligated to air content on a free, first-come, first-served basis. See pages 5-6, 9, 26, *supra*. MNN recognized as much below. See JA59-60. Any private right MNN arguably holds is therefore subject to a public easement. And the City may designate that easement as a public forum. See Restatement (Third) of Property § 2.1 (2000) (describing ability of a contract to impose a servitude).

c. If (contrary to fact) the rights of cable operators are at issue here, they are similarly subject to an easement.

In a franchise agreement, a cable operator receives a critical benefit not available to the public at large—permission to use public rights-of-way to erect a cable system. See 47 U.S.C. § 541(a). The government owns and manages these rights for the public welfare. Here, Time Warner expressly bargained for access to these rights. See, *e.g.*, Franchise Agreement §§ 1.47, 4.1.

In exchange for conferring this benefit on Time Warner, the City received a reciprocal easement—the right to place content over certain channels on the cable system. As we have described, the Franchise Agreement requires a minimum of six public

access channels (Franchise Agreement § 8.1), and it obligates Time Warner to transmit public access channels to all subscribers (*id.* § 8.1.6). The Franchise Agreement contains detailed provisions about various enforcement mechanisms, including an "injunction," if necessary. See, *e.g.*, *id.* § 15.1.6. The cable operator cannot transfer the cable franchise without the City's permission (*id.* § 13.1), and the CAO Agreement obligations expressly bind any successor (CAO Agreement § 5.2).

In sum, the Franchise Agreement conferred on the City a legally-enforceable right to place content on Time Warner's cable system in exchange for Time Warner's right to run cable through public rights-of-way. That obligation follows the cable system itself, continuing to apply even if Time Warner sells its cable system. The content placement right—and the public forum it represents—has existed since the creation of the cable company's property right in the cable system. These express contractual provisions thus create a servitude on the underlying property rights. See Restatement (Third) of Property § 2.1.

D. Congress vested local governments with discretion to experiment—and the wisdom of establishing public forums is properly a local decision.

Congress has conferred discretion on state and local governments to create public access television and, if they choose to exercise that discretion, how to structure it. See, *e.g.*, 47 U.S.C. § 531 ("A franchising authority *may* establish requirements" regarding PEG channels.) (emphasis added). The courts should respect New York's policy choices.

"This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). The Court affords "[d]eference to state lawmaking," which "allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Ibid.* Indeed, local governments are "in a better position than the Judiciary to gather and evaluate data on local problems." *City of L.A.* v. *Alameda Books, Inc.*, 535 U.S. 425, 440 (2002).

Often, as reflected here, "[f]ederalism secures the freedom of the individual." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). New York has chosen to designate for its residents a public forum in public access television. That freedom-enhancing decision is properly the right of a state or local government.

For these reasons, petitioners' concern regarding the policy consequences of New York's action are misplaced. See Pet'rs Br. 58-59. See also CAC Br. 22-28.[18] Petitioners should direct these views to New York government—not this Court. If, as petitioners maintain, existing state law is bad policy, New York can change it. The wisdom of New York's decision as a policy matter is not a question for this Court. The Court should not "disable local governments from

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[18] Chicago Access Corporation's concerns are additionally unfounded because there is no evidence that Illinois or Chicago has adopted a first-come, first-served policy.

making" "choice[s]" regarding how to structure public access. *Denver Area*, 518 U.S. at 773 (Stevens, J.).

In all events, petitioners' concerns regarding the practicalities of our position lack merit. To begin with, for decades, the First Amendment has governed the scores of public access channels across the nation that are run *directly* by municipalities. See, *e.g.*, page 35, *supra*. Several courts, moreover, have entertained First Amendment claims against public access stations. See Pet. App. 49a-50a & n.7. See also Pet'rs Br. 27-30. Yet petitioners muster no real-world examples of judicial overreach. Pet'rs Br. 58-59.

That is for good reason: Regardless whether New York's public access channels are limited or unlimited public forums, MNN may impose neutral time, place, and manner restrictions. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech."). While this requires "narrow tailoring," the administrator of a forum need not choose "the least restrictive or least intrusive means" of regulating it. *Id.* at 798-799. MNN certainly can schedule its programs—just as school districts can schedule outside groups' meetings in classrooms, even when those classrooms have been opened as a public forum. And, if MNN is a limited public forum, it may reasonably restrict the range of speakers and the permissible subjects of speech. See *Good News Club*, 533 U.S. at 106-107.

Subjecting MNN to the First Amendment precludes viewpoint discrimination in its administration of the public access channel. According to its own policies, MNN *already* disclaims viewpoint discrimina-

tion. Pet. App. 37a. And, in the district court, petitioners conceded that, pursuant to state law, MNN cannot "exercise viewpoint-based discrimination." JA60. Applying the First Amendment cannot pose any practical burden because, as MNN concedes, it is already subject to state law requiring viewpoint neutrality.

What is more, MNN is a state actor solely to the extent it performs a public function—here, administering a public forum. See pages 51-59, *infra*. We do not contend that any of MNN's *other* conduct is subject to constitutional standards.[19]

MNN's preference to avoid litigation—a preference no doubt shared by the school in *Good News Club* and the university in *Rosenberger*—is no reason to cast off constitutional obligations. The Court does not allow schools to discriminate against religious organizations merely because litigation itself can be an "expense" or "distraction" in the face of "scarce resources." Pet'rs Br. 59. The result should be no different here.

Finally, lower courts are well-equipped to weed out meritless claims. The claim in this case, however, does have merit. Respondents criticized MNN for terminating a grant program while simultaneously increasing executive compensation. MNN subsequently retaliated by banning respondents—and their speech—from the public access channels.

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[19] We do not contend that MNN is subject to "state sunshine" laws. Pet'rs Br. 59 n.14. That said, MNN is subject, expressly, to a public disclosure law. See page 6, *supra*.

E. This case does not address other public access structures, cable operators, the Internet, or private property.

The Court should decide this case on its narrow terms.

1. Petitioners are wrong to assert that the rule implicated here has any bearing on "Time Warner, Facebook, Twitter, and National Public Radio." Pet'rs Br. 57.

To begin with, this case involves public access in only the few states with a free, first-come, first-served rule. See pages 30-31, *supra*. We do not urge—and the Court should not adopt—a one-size-fits-all approach.[20]

Moreover, as *amicus* NCTA underscores, this case does not implicate rights relating to a cable distributor. See page 39, *supra*. The issue that divided the Court in *Denver Area* is not presented here.

Nor does this case involve privately-owned Internet sites. The Internet Association (at 23) confirms the "highly specific facts" present in this case—and the "correspondingly limited holding" that is warranted. While the Internet Association opposes imposing the First Amendment on private Internet sites, it is neutral as to this case. *Id.* at 24. This fatally undermines the speculative fears raised by peti-

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[20] Nor does this case address leased access television, where no government has designated the channel as a forum open to the public. Cf. Pet'rs Br. 26 n.4. *Loce* v. *Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999), is therefore consistent with our argument; there was no state-imposed free, first-come, first-served rule there. Pet. App. 15.

tioners (at 56-57) that a holding for respondents would render Internet sites public forums.

Indeed, only a *government* may designate a public forum; a public forum cannot be created by a private party or via government inaction. See pages 22-24, *supra*. See also EFF Br. 19. The First Amendment does not govern spaces created by private parties—even if those privately-owned spaces have facial similarities to public forums. See Cato Br. 11-14; Chamber Br. 7-9. Facebook and YouTube, for example, are not "public forums" in the First Amendment sense.[21] This also explains why our rule has no bearing on National Public Radio or any other forum that has not been designated by the government as generally open to the public.

2. Petitioners and some *amici* focus on the extent to which a government may designate a public forum on private property. See Pet'rs Br. 30-34, 56-58. But that is not this case: As we have explained, New York City, not MNN, owns and controls the public access channels. See pages 32-43, *supra*. If a government did seek to designate a public forum on private property, two complex questions would emerge. Petitioners have not raised—because they cannot raise—either contention.

The first is the extent to which the government's action is consistent with the Takings Clause. In *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980), then-Justice Rehnquist's majority opinion held that the state's requirement allowing individu-

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[21] Additionally, the Dormant Commerce Clause precludes state and local governments from regulating Internet websites. See *Maine* v. *Taylor*, 477 U.S. 131, 138 (1986).

als "rights of free expression and petition on shopping center property clearly" was not an "unconstitutional infringement of * * * property rights under the Taking Clause." In *Dolan* v. *City of Tigard*, 512 U.S. 374, 394 (1994), Chief Justice Rehnquist's majority opinion held that a taking "different in character" from that in *PruneYard* could state a constitutional claim.

Because this case does not involve the designation of private property as a public forum, this case is outside the takings analysis entirely. That is likely why MNN has never made a takings argument. MNN had no private property rights in the public access channels. Moreover, there was no use of "the government's power to *redefine* the range of interests included in the ownership of property." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (emphasis added). Even if MNN has a property interest in the public access channels, nothing has ever been taken from it; the administrative authority over the channel that the City gave MNN has always been subject to the first-come, first-served requirement.

Second, the First Amendment generally precludes the government from obligating individuals or companies to speak, or to host others' speech. See, *e.g.*, *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n of Cal.*, 475 U.S. 1 (1986); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974).

But petitioners have not advanced any such argument. Nor could they. MNN entered into the CAO Agreement that provides MNN, among other things, substantial funding. As petitioners recognize (JA59-60), MNN agreed, as a condition of receiving funding,

that it may not engage in editorial curation or viewpoint discrimination on the government-provided channels. See pages 8-9, 26-28, *supra*.

MNN has continued to voluntarily accept this requirement. As MNN says in response to the frequently asked question "[w]hat can I put in my show," "MNN champions freedom of speech. You can take any political stance or preach any religious idea. You can also even record a flower for 28 minutes or play a uk[u]lele and sing expletives! We encourage you to use MNN as a platform to broadcast your voice to the world." *FAQs*, MNN, perma.cc/JL3B-HF7H. Far from objecting to being a first-come, first-served forum for speech, MNN has embraced that as its mission. Pet. App. 37a.

Even if MNN had objected, there is not "a plausible fear" here that viewers would attribute respondents' speech to MNN. *Rosenberger*, 515 U.S. at 841. Absent such a fear, requiring MNN to merely provide space for the speech does not unconstitutionally compel MNN to speak. See, *e.g.*, *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006); *PruneYard*, 447 U.S. at 87-88.[22]

Petitioners have never—here or below—raised either a takings or a compelled speech claim. That is for good reason, as neither doctrine provides petitioners any support in the context of this case. In different circumstances, however, these constitutional protections may limit state authority.

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[22] Because there is no claim by or against a cable operator, the First Amendment rights of cable operators are not implicated, either. See NCTA Br. 3. In particular, the viability of *Turner I* is not at issue.

II. Administering a public forum is a public function.

When a government assigns a public function to a nominally private actor, constitutional safeguards continue to apply. As this Court has long held, "[t]he State cannot avoid its constitutional responsibilities by delegating a public function to private parties." *Georgia* v. *McCollum*, 505 U.S. 42, 53 (1992).

Administering a public forum qualifies as such a public function. Were it otherwise, a municipality could bypass the First Amendment wholesale by interposing a nonprofit as the entity that approves demonstration permits for a public park or decides who may use school classrooms.

A. The Constitution governs the performance of public functions.

The Court has, "of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). A public function is that "which is traditionally associated with sovereignty." *Id.* at 353.

The Court was unanimous on this point in *Brentwood*. As the majority explained, "a nominally private entity" is treated "as a state actor" "when it has been delegated a public function by the State." *Brentwood*, 531 U.S. at 296. The dissent agreed that the Constitution applies when the entity is performing "a function that has been traditionally exclusively reserved to the State." *Id.* at 309 (Thomas, J.) (quotation omitted).

For their part, petitioners do not dispute that a government's delegation of a public function to a pri-

vate entity is a sufficient basis to find state action. See Pet'rs Br. 41. Chicago Access Corporation (CAC), however, asserts that there is some overlooked rule by which a private entity performing a public function does not qualify as a state actor to the extent that it allegedly "*violated* state law." CAC Br. 9.

Not only is that argument contrary to the unanimous views of the Court in *Brentwood*, but it is foreclosed by *West* v. *Atkins*, 487 U.S. 42 (1988), a case that CAC does not cite, much less discuss. *West* involves the state's sovereign authority to incarcerate convicted criminals and the Eighth Amendment's corresponding obligation "to provide adequate medical care to those whom it has incarcerated." *Id.* at 54. When "the State delegate[s] that function" to a private doctor, the doctor takes on a public function, subject to constitutional limits. *Id.* at 55-56. Private action alone cannot create this designation, because "[i]t is only those physicians authorized by the State to whom the inmate may turn." *Id.* at 55. In *West*, the doctor was alleged to have violated state negligence law, but he was subject to the Constitution all the same. *Id.* at 48 n.8.

West ultimately establishes that the state has a constitutional obligation "to provide medical treatment to injured inmates," and "the delegation of that traditionally exclusive public function to a private physician [gives] rise to a finding of state action." *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 55 (1999). That is a sufficient basis for a Section 1983 claim. See *West*, 487 U.S. at 49 ("[I]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, that conduct is also action under color of state law and will support a suit

under [Section] 1983.") (quotation and alteration omitted).

West is consistent with the Court's longstanding law that delegation of a traditional, exclusive public function is a sufficient basis to conclude that a nominally private entity "may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). *Lugar* itself identifies and endorses the propriety of "the 'public function' test." *Id.* at 939. *Lugar* denied state action in circumstances where there was *not* a delegated public function *and* the defendant acted in derogation of state law. See *ibid.* *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), are likewise inapposite, because neither involved delegation of an actual "public function."

A contrary result would leave a broad gap in the Constitution's protection of individual rights. If "[c]ontracting out" public functions to a private party "were the basis for delimiting [Section] 1983 liability, 'the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to "private" actors, when they have been denied.'" *West*, 487 U.S. at 56 & n.14. While states have flexibility in how they wish to perform public functions, they have no flexibility to avoid the Constitution.

B. Administering a public forum is a public function.

Administration of a public forum is a traditional and exclusive state function. A state may not avoid the First Amendment by contracting the function out to a private entity.

1. This is not an open question; the Court resolved it in *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

Relying upon its early public forum cases, including *Hague*,[23] the Court identified the restrictions the First Amendment imposes on the ability of state actors to restrict speech rights in "streets" and "sidewalks." *Marsh*, 326 U.S. at 504 & n.1. The Court concluded that regardless of whether a corporation or municipality administers those forums, "the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id.* at 506-507.

Marsh thus establishes that "the exercise of constitutionally protected rights on the public streets"—which are a quintessential public forum—"could not be denied by the owner," even where that entity is nominally private. *Evans*, 382 U.S. at 299. See also *Brentwood*, 531 U.S. at 313 (Thomas, J., dissenting) (*Marsh* recognized that administering "the streets of a company town" is state action); *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 639 (1991) (O'Connor, J., dissenting) (*Marsh* held that a company town's "attempt[ing] to prohibit on its sidewalks certain protected speech" was a "traditional government function").

2. Even if the question were open, the answer remains. The function of administering a designated public forum exclusively and traditionally rests with the state.

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[23] *Perry* identifies Justice Roberts' opinion in *Hague* as a foundational authority regarding public forums. See 460 U.S. at 45.

To begin with, the power to designate a public forum is an exclusive state function. A public forum is that which the "government" has "lawfully dedicated" as a place where the "principal purpose [is] the free exchange of ideas." *Krishna Consciousness*, 505 U.S. at 678-680. Government "inaction" cannot "create a public forum." *Id.* at 680. Nor can a private party create a public forum; even if a private entity opens a place for the public to speak, that is not a "public forum" within the meaning of the First Amendment. *Ibid.*

What is more, the power to administer a "public forum" lies exclusively with the state or its delegee. Absent a delegation from the state, private parties categorically cannot determine who has access to public parks or public classrooms. This is thus an exclusive function of the state, inherently tied to sovereign authority.

This is also the sort of function to which the Constitution directly speaks. As this Court has long identified, the First Amendment strongly protects speech in a public forum. See *Rosenberger*, 515 U.S. at 829; *Police Dep't of City of Chi.* v. *Mosley*, 408 U.S. 92, 96 (1972). That the Constitution bears specifically on this particular sovereign function helps confirm that it is among the narrow range of "public functions."

Administration of a public forum is also traditionally a state function. As Justice Roberts said long ago, "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public

questions." *Hague*, 307 U.S. at 515. Such forums—and their regulation—have existed since "ancient times." *Id.* at 515-516.

These points are all parallel to the holding in *West*. Only a government, exercising sovereign authority, can hold individuals prisoner; thus, providing services to those individuals requires sovereignty. See *West*, 487 U.S. at 55-56. And the Eighth Amendment protects prison inmates against cruel and unusual punishment (*id.* at 56), just as the First Amendment protects speakers in public forums.

Meanwhile, administering a public forum is distinct from non-sovereign functions that are not the exclusive prerogative of the state. Running a public utility, for example, does not qualify as a public function because it does not depend on "sovereign[]" authority; non-sovereigns can and do run utilities. *Jackson*, 419 U.S. at 353. Likewise, the education of special-needs students is not the "exclusive province of the State." *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982).

The lower courts agree that administering a public forum is a public function. See Pet. App. 19a (Lohier, J., concurring) ("A private entity's regulation of speech in a public forum is a public function when the State has expressly delegated the regulatory function to that entity."); *Watchtower Bible & Tract Soc'y* v. *Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011); *United Church of Christ* v. *Gateway Econ. Dev. Corp.*, 383 F.3d 449, 454-455 (6th Cir. 2004); *Lee* v. *Katz*, 276 F.3d 550, 555 (9th Cir. 2002).

3. Petitioners, trying to make this case about *all* public access channels, characterize the relevant function as "[t]he provision of cable television gener-

ally" or "public access channels in particular." Pet'rs Br. 43. These, petitioners contend, are not functions "*traditionally* provided by government." *Ibid.*

That is not our argument. As a section heading in our brief opposing certiorari made clear, our contention is that "[a]dministering *public forums* is a public function." Opp. 21 (emphasis added).

The closest petitioners come to engaging this point is their recognition of Judge Lohier's concurrence, explaining that "New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels." Pet. App. 21a. Petitioners respond that this "improperly assumes the antecedent." Pet'rs Br. 44. A finding of a public forum is of course the first step to this analysis. If, however, we are right about the antecedent, petitioners have no substantive argument. And we have explained why petitioners are flatly wrong to assert that the City lacks control as to the public access channels. See pages 33-38, *supra*.

By contrast, administering a gathering place that is *not* a "public forum" within the meaning of the First Amendment is not a public function. For example, because they do not qualify as traditional or designated public forums, the First Amendment does not govern privately-owned shopping malls. See, *e.g.*, *Hudgens* v. *NLRB*, 424 U.S. 507, 508, 522 (1976).

4. While our argument focuses on the public function analysis, "the direct and indispensable participation" of what is "beyond all question * * * a state actor" helps confirm the presence of state action. *Edmonson*, 500 U.S. at 624.

MNN's existence derives from sovereign acts. New York City incorporated MNN and appointed its initial board. See page 7 n.1, *supra*. MNN administers the public access channels solely because the City created them and designated MNN as the administrator. See pages 7-9, 33-38, *supra*. Meanwhile, the City retains discretion to replace MNN. See pages 36-37, *supra*. And MNN depends upon the City's coercive funding; the City obligates cable operators to fund MNN. See pages 8-9, *supra*.

To be clear, we do not maintain that the sovereign's creation and maintenance of a nominally private entity alone compels the finding of state action. But these unique circumstances further militate in favor of the result reached below.[24]

5. There is an additional basis to conclude that MNN's conduct with respect to its content decisions qualifies as state action. State law wholly dictates the terms on which MNN airs content. The first-come, first-served mandate imposed by law and contract displaces any independent decision-making and strips MNN of editorial discretion. State law also compels MNN to provide free access to users. And

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[24] Petitioners suggest that respondents could seek relief from the New York Public Service Commission. See Pet'rs Br. 59-60. They do not, however, assert that this has any bearing on respondents' claims here. A state cannot avoid constitutional claims by creating an administrative agency; "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under [Section] 1983." *Zinermon* v. *Burch*, 494 U.S. 113, 124 (1990). Nor is there any basis to conclude that the state agency actually adjudicates *First Amendment* claims or provides remedies commensurate with a constitutional claim. Indeed, respondents *tried* to bring such a claim, but they secured no remedy. See Dist. Ct. Dkt. No. 49.

MNN's authority rests on a delegation of power from New York City. The City, meanwhile, maintains control over the public access channels. As *amicus* ACLU argues, in the entirety of these unique circumstances, MNN engages in state action when making content decisions. See *National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179 (1988); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970).

C. The public function doctrine precludes circumvention of the First Amendment.

As *Rosenberger*, *Good News Club*, *Marsh*, and others hold, the public forum doctrine precludes discrimination against disfavored speakers. Yet if the First Amendment did not apply when the government appointed a nonprofit to administer the forum, such discrimination would become commonplace.

Take *Lamb's Chapel*. Once the school board opened school facilities for "social, civic and recreational meetings," it could not deny access to an evangelical church on the basis of its views. 508 U.S. at 397. But under petitioners' theory, if the school interposed a nonprofit to serve as facility gatekeeper, such denials would be constitutional. That is not, and should not become, the law. Holding otherwise would destabilize fundamental First Amendment protections, with the predictable result of harming politically disfavored groups.

* * *

This case illustrates that, in our federal system, state and local governments are free to make different policy decisions. Some of those choices have constitutional ramifications. New York has made a unique, freedom-enhancing decision to open a partic-

ular kind of public forum to its citizens. Its ability to make this choice deserves respect.

CONCLUSION

The Court should affirm the judgment entered below.

Respectfully submitted.

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JANUARY 2019

APPENDICES

APPENDIX A

Cable Franchise Agreement
by and between
The City of New York
and
Time Warner Entertainment Company, L.P.

* * *

THIS AGREEMENT (this "Agreement") is entered into by and between the City of New York ("the City"), a validly organized and existing political subdivision of the State of New York, and Time Warner Entertainment Company, L.P., a limited partnership duly organized under the applicable laws of the State of Delaware ("Franchisee").

WHEREAS, the City is a "franchising authority" in accordance with Title VI of the Communications Act, (see 47 U.S.C. § 522(10)) and is authorized to grant one or more nonexclusive cable franchises pursuant to Article 11 of the New York Public Service Law, as amended, and Title 16, Chapter VIII, Parts 890.60 through 899, of the Official Compilation of Codes, Rules and Regulations of the State of New York, as amended; and

WHEREAS, pursuant to Section 363(a) of the New York City Charter (the "City Charter"), franchises are to be awarded by the City in accordance with the provisions of authorizing resolutions adopted by the City Council of the City (the "City Council"); and

WHEREAS, the City Council adopted Resolution No. 538 on September 27, 2006 (the "Resolution")

which authorizes, until September 27, 2011, the Department of Information Technology and Telecommunications ("DoITT") to grant nonexclusive franchises for the provision of cable television services; and

WHEREAS, on September 16, 1998 a franchise agreement was executed between the City and Franchisee (or the predecessor in interest to Franchisee) granting a franchise for the provision of certain services in the Franchise Area (as hereinafter defined), pursuant to the terms described therein, said franchise agreement referred to hereinafter as the "1998 Franchise"; and

WHEREAS, the scheduled term of the 1998 Franchise expired on September 16, 2008, and Franchisee sought a renewal of its rights to provide Cable Services in the Franchise Area (as hereinafter defined) pursuant to the terms of this Agreement and 47 U.S.C. § 546; and

WHEREAS, the City, pursuant to the terms of the Cable Act (as hereinafter defined), has identified the City's future cable-related community needs and interests and, pursuant to the City Charter, has issued a solicitation for cable television franchise renewals (the "Solicitation") to which Franchisee responded; and

WHEREAS, in response to the Solicitation, Franchisee submitted materials regarding the terms and conditions for its continued operation and maintenance of its Cable System and provision of Cable Services (as hereinafter defined) and other matters; and

WHEREAS, Franchisee and the City have completed arm's-length negotiations regarding the terms and conditions pursuant to which the City intends to grant to Franchisee, and Franchisee intends to accept

from the City, a franchise (the "Franchise") described generally in Section 4.1 hereof and more specifically renewing Franchisee's rights to provide Cable Services in the Franchise Area (as hereinafter defined) pursuant to 47 U.S.C. § 546 and pursuant to the complete terms of this Agreement; and

WHEREAS, the City has, with respect to such proposed renewal franchise, complied with the New York State Environmental Quality Act ("SEQRA") (Section 8-0101 *et seq.* of the New York State Environmental Conservation Law), the SEQRA regulations set forth at Part 617 of Title 6 of the New York Code of Rules and Regulations, and the City Environmental Quality Review process (Chapter 5 of Title 62 and Chapter 6 of Title 43 of the Rules of the City of New York); and

WHEREAS, the Department of City Planning has determined pursuant to Section 363(c) of the City Charter that the franchise renewal granted pursuant to and consistent with the terms of the Solicitation would not have land use impacts or implications and therefore is not subject to the Uniform Land Use Review Procedure ("ULURP") set forth in Section 197-c of the City Charter; and

WHEREAS, Franchisee has completed all required submissions under the City's VENDEX process, and the City's review thereof has been completed; and

WHEREAS, pursuant to Section 371 of the City Charter, the Franchise and Concession Review Committee (the "FCRC") held a public hearing on a proposed franchise for Franchisee, with respect to the Franchise Area, and including terms of an agreement

memorializing the terms and conditions of the proposed franchise; and

WHEREAS, said hearing before the FCRC was held within 30 days of the date that DoITT filed a proposed franchise agreement with the FCRC; and

WHEREAS, a notice of said hearing and a summary of the terms and conditions of the proposed Franchise were properly published in the City Record; and

WHEREAS, at least 15 days, excluding Sundays and legal holidays, elapsed between publication of said hearing notice and summary in the City Record and the commencement of such hearing before the FCRC; and

WHEREAS, before the FCRC hearing, the requirements regarding publication of notice of such hearing as set forth in Section 371 of the City Charter were met; and

WHEREAS, the FCRC has approved the grant to Franchisee of the Franchise and the terms of this Agreement as described herein; and

WHEREAS, pursuant to Section 895.1 of Title 16 of the New York Code of Rules and Regulations, Franchisee's technical ability, financial condition, and character were considered and approved by the City in a full public proceeding affording due process; Franchisee's plans for its Cable System (as hereinafter defined) were considered and found to be adequate and feasible in a full public proceeding affording due process; the Franchise complies with the franchise standards of the NY PSC (as hereinafter defined); and the Franchise is nonexclusive; and

WHEREAS, the City, following said public proceeding, determined that this Franchise granting Franchisee a nonexclusive franchise complies with the franchise standards set forth in the Cable Act, the Resolution, the aforementioned Public Service Law, the regulations of the NY PSC (including any necessary waivers that the parties may seek and obtain) and all other applicable laws and regulations; and

WHEREAS, the City and Franchisee have determined that this Agreement complies with the franchise standards set forth in the Resolution, Section 363 of the City Charter, Section 626 of the Cable Act as amended, Section 222 of the Public Service Law, the regulations of the NY PSC, and all other applicable laws and regulations; and

WHEREAS, the City and Franchisee have reached agreement on the terms and conditions set forth herein and the parties have agreed to be bound by those terms and conditions.

NOW, THEREFORE, in consideration of the foregoing clauses, which clauses are hereby made a part of this Agreement, the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged,

THE SIGNATORIES DO HEREBY AGREE AS FOLLOWS:

* * *

1. DEFINITIONS

* * *

1.18 *Community Access Organization (or "CAO"):* Shall mean the nonprofit corporation that has been

designated by the Borough President, as described in Section 8.1.7 of this Agreement, for the purposes described in that section.

* * *

1.47 *Public Rights-of-Way:* The surface of, and the space above and below, any and all streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers, public grounds and public places or waters within and belonging to the City and any other property within the City, to the extent to which there exist public easements or public rights of way.

* * *

3. EFFECTIVE DATE AND TERM:

3.1 *Effective Date and Term:*

(a) *Effective Date & Scheduled Termination Date:* This Agreement and the Franchise granted herein shall become effective on the date that the NY PSC issues a certificate of confirmation for this Franchise (the "Effective Date") following the Closing (which certificate Franchisee shall submit all required applications for within 30 days of the Closing); provided that implementation of this Agreement shall be subject to the applicable registration provisions of City Charter sections 375 and 328. The term (the "Term") of this Agreement and the Franchise granted herein shall run from the Effective Date until (but not including) July 18, 2020 (the "Scheduled Termination Date"), unless the Franchise is earlier terminated as provided herein. Franchisee shall memorialize the Effective Date by notifying the City in writing of the occurrence

of said Effective Date, which notification shall become a part of this Franchise.

* * *

4. GRANT OF AUTHORITY; LIMITS AND RESERVATIONS

4.1 *Grant of Authority:* (a) The City hereby grants Franchisee, subject to the terms and conditions of this Agreement, a nonexclusive franchise providing the right and consent to install, operate, repair, maintain, remove and replace cable, wire, fiber optic lines or other transmission medium that may be used in lieu of cable, wire or fiber optic lines for the same purposes, and related equipment and facilities, on, over and under the Public Rights-of-Way in order to provide Cable Services. The City and Franchisee agree that this franchise is a grant of the right to provide cable service pursuant to 47 U.S.C. § 541. It is the City's position that authorization to install non-closed path transmission facilities, such as antennae and related equipment, on, over or under the Public Rights-of-Way is not granted pursuant to this Agreement, although Franchisee is permitted to separately seek a franchise granting such authorization. It is the City's position that the franchise granted hereunder does not include the right or consent to use the Public Rights-of-Way for the transmission of any Information Service or Telecommunications Service, unless such authority is expressly granted hereinafter, although to the extent not thus expressly granted hereinafter Franchisee is permitted to separately seek authority from the City granting such authorization. It is the City's position that the franchise granted hereunder does not include the right or consent to install, maintain or operate any computer kiosks or other similar facilities on the Public Rights-of-Way

the purpose of which is the reception and use of an Information Service, or any other service, by pedestrians, vehicles or others users or occupants of the Public Rights-of-Way, although Franchisee is permitted to separately seek authority from the City granting such authorization. Franchisee does not agree with all of these positions of the City, as it believes the City's grant of a franchise hereunder, as a matter of law, provides Franchisee with certain additional rights, and Franchisee reserves all rights, and does not waive any rights, in that regard.

(b) Without limiting the City's authority to argue that separate and additional franchise rights are required to provide Non-Cable Services where, as in this Agreement, it is the City's position that the right to offer such Non-Cable Services has, by express reservation, not been granted, to the extent Non-Cable Services are in fact provided by Franchisee pursuant to claimed legal authority rather than pursuant to one or more separately granted, express written franchises from the City, such shall be referred to in this Agreement as "Additional Provided Services".

(c) The City and Franchisee each reserve all of their respective rights with respect to Franchisee's provision of Non-Cable Services (including as provided in the preceding subsections (a) and (b)); provided, however, that the City agrees that, absent any modification or clarification of existing law, the City will resolve any dispute between the City and Franchisee as to such Non-Cable Services solely by means of an action for declaratory judgment, and shall not contend that Franchisee's provision of Non-Cable Services without the payment, under this Agreement, of franchise or other fees with respect to such services

constitutes a Default as defined in Article 15 of this Agreement.

* * *

8. PEG SERVICES

8.1 *PEG Set Aside:* In order to ensure universal availability of Public, Educational and Government Access programming, Franchisee shall provide on the Basic Service tier use of seventeen (17) Access Channels in total, subject to, and phased in over the Term as set forth below in, this Section 8.1:

8.1.1 *Continuing Public Access Channels:* Throughout the Term, four (4) Public Access Channels.

8.1.2 *Continuing Government/Educational Access Channels:* Throughout the Term, five (5) Government/Educational Access Channels, one of which is designated by the City for educational Access Channel programming.

8.1.3 *Additional Access Channels:* In addition to providing the Access Channels described in Sections 8.1.1 and 8.1.2 above, Franchisee shall provide the City with the following additional Access Channels on the Basic Service tier, subject to the conditions set forth below:

8.1.3.1 Commencing not later than sixty days after the Effective Date and thereafter throughout the Term, Franchisee shall provide: (i) an additional two (2) Public Access Channels; and (ii) one (1) additional Government/Educational Access Channel.

8.1.3.2 Commencing not later than the later to occur of (x) January 1, 2012, and (y) the one hundred eightieth (180th) day after Franchisee's receipt of a written request from the City for such additional

channels, and then thereafter throughout the Term, Franchisee shall provide to the City: (i) one (1) further additional Public Access Channel; and (ii) two (2) further additional Government/Educational Access Channels.

8.1.3.3 Commencing not later than the later to occur of (x) July 15, 2014, and (y) the one hundred eightieth (180th) day after Franchisee's receipt of a written request from the City for such additional channels, and then thereafter throughout the Term, Franchisee shall provide to the City a further additional two (2) Public Access Channels.

8.1.3.4 No single additional Government/Educational Access Channel or additional Government/Educational Access Channels to be provided pursuant to this Section 8.1.3 shall be activated by Franchisee unless (a) the City has provided notice to Franchisee that additional programming is available for each such additional channel, and (b) all existing Government/Educational Access Channels are providing original, non-text, non-duplicative programming for at least eighty percent (80%) of the time between 6:00 AM and 12:00 AM for the preceding six (6) consecutive months. With respect to Public Access Channels, no single additional Public Access Channel or additional Public Access Channels to be provided pursuant to this Section 8.1.3 shall be activated by Franchisee unless all existing Public Access Channels are providing programming for at least eighty percent (80%) of the time between 6:00 AM and 12:00 AM for the preceding six (6) consecutive months.

8.1.4 *Fallow Time:* In the event that one or more Public or Government/Educational Access Channels are not being utilized by the City or the CAO's, the

provisions of 16 NYCRR 895.4 (c)(12) shall be applicable.

8.1.5 The City hereby authorizes Franchisee to transmit on the Access Channels the Access Channel programming the City submits to Franchisee for such transmission.

8.1.6 (a) All Access Channels shall be provided to Subscribers as part of the same tier of Service as are all those signals (hereinafter "must-carry signals") carried in fulfillment of the requirements of 47 U.S.C. §§ 534 and 535 (provided, however, that Franchisee reserves the right to claim that such a franchise requirement regarding the tier on which Access Channels must be carried is preempted, in whole or in part, by federal law). Provision of Access Channels on "the same tier of service" as must-carry signals, as that concept is expressed in the preceding sentence, shall mean provision of such channels for a package price (for a package of services which include the Access Channels, the must-carry signals and any other channels Franchisee in its discretion chooses to include in such tier). Notwithstanding the preceding provisions of this Subsection 8.1.6(a), (i) while the City and Franchisee each reserve all rights with respect to the format in which Franchisee provides Access Channels, the City agrees not to object to Franchisee's provision of the additional Access Channels required pursuant to Sections 8.1.3, 8.1.3.1, 8.1.3.2 and 8.1.3.3 hereof (as well as one existing Government/Educational Access Channel) in digital format even if other channels that are part of the Basic Service tier are provided in analog format; and (ii) the Commissioner, in his or her discretion, may approve the provision of any Government/Educational or (after consultation with the Community Access Organization) Public Access

Channel in any manner that varies from said provisions upon a determination that such variance would be in the City's interest.

(b) Franchisee shall carry Access programming on each of the respective Public or Government/Educational Access Channels as indicated in Appendix J. In the future, Franchisee shall assign the Public or Government/Educational Access Channels on its channel line up as configured elsewhere within the City to the extent such channel assignments do not interfere with any other channels or fall outside the range of the Franchisee's respective channel lineup. Franchisee shall not arbitrarily or capriciously change such channel assignments, and Franchisee shall minimize the number of such changes; provided, however, that Franchisee may change such channel assignments as it deems appropriate so long as (i) Franchisee gives the appropriate CAO or the Government/Educational Access Channel programmer ninety (90) days notice of such change (if commercially practicable) but in no event less than forty-five (45) days, and (ii) Franchisee provides, free of charge, public announcements of such changes that shall include (A) to the extent Franchisee has advertising availability, advertising such Public or Government/Educational Access Channel change on advertising inserts on local channels carrying non-satellite programming in prime time at least thirty (30) seconds per day for the time period of thirty (30) to fifteen (15) days prior to such change and two (2) minutes per day for the fourteen (14) days prior to such change (provided, however, that if Franchisee does not have advertising availability at the commencement of the thirty (30) to fifteen (15) day period, as soon as advertising space becomes available, Franchisee shall then provide the advertising contemplated under this Subsection

8.1.6), and (B) providing notice of such change in at least two monthly Subscriber bill inserts prior to such change (if commercially practicable) but in no event less than one monthly Subscriber bill insert; provided, however, that such bill inserts shall not be necessary in the event the Franchisee provides the requisite notice of such changes to all Subscribers in a letter separate from their bill.

(c) Notwithstanding the preceding subsection (b), but subject to applicable law, Franchisee shall retain, throughout the Term, Channel Positions for Government/Educational Access Channels at Channel Positions 74 and 75, unless the Commissioner in the Commissioner's reasonable discretion approves other Channel Positions for such channels upon a written request by Franchisee (with supporting documentation), provided, however, that nothing in this Section 8.1.6(c) shall be construed to require Franchisee to allocate Channel Positions in a manner that conflicts with existing and/or any future applicable law governing the location of Channels, including, without limitation, the signal carriage and positioning requirements set forth in 47 C.F.R. §§ 76.51-76.70 and 47 U.S.C. §§ 534 and 535, as such may be amended or superseded during the Term of this Agreement. To the extent that Franchisee enters into an agreement with the Community Access Organization regarding Channel Positions for one or more of the Public Access Channels, then notwithstanding anything to the contrary herein, the Channel Positions for Public Access Channels as specified by such agreement, so long as it is in effect, shall be deemed to be required hereunder in lieu of any contrary provisions of this Agreement (except to the extent such affect the Channel Locations for Government/Educational Access Channels,

in which event the provisions of this Agreement shall prevail).

8.1.7 The City shall provide a suitable video signal and a suitable audio signal for each Government/Educational Access Channel. Franchisee, upon receipt of the suitable video signal, shall provide, install and maintain in good working order the equipment necessary for transmitting the Government/Educational Access Channel signal to the channel aggregation site for further processing for distribution to Subscribers. Franchisee's obligations with respect to such upstream transmission equipment and facilities shall be subject to the availability, without charge to Franchisee, of suitable required space, environmental conditions, electrical power supply, access, pathway, and facilities and such cooperation of the City as is reasonably necessary for Franchisee to fulfill such obligations; provided, however, that neither Franchisee nor the required site work contemplated hereunder shall impose any unreasonable material burdens on the City.

8.1.7.1 Such upstream transmission provided by Franchisee shall comply with applicable FCC standards governing the transport and distribution of Government/Educational Access Channel signals to Subscribers. If Franchisee makes changes to the Cable System that require improvements to Government/Educational Access Channel facilities to continue to be used as they were intended under the terms of this Agreement, then Franchisee shall, without charge to the City, make such changes in either the equipment and facilities referred to in this Subsection 8.1.7 or in Franchisee's video channel aggregation point and distribution equipment and facilities

in order to permit the continuation of such intended use.

8.1.7.2 The Government/Educational Access Channels shall be placed under the jurisdiction of the Mayor and shall be for the noncommercial use of the City, for noncommercial use by New York City public schools and the New York City Board of Education and other not-for-profit educational institutions chartered or licensed by the New York State Department of Education or Board of Regents in the Franchise Area as specified by the City.

8.1.7.3 *Government/Educational Access Video on Demand:* In addition to the dedicated Government/Educational Access Channels described in Sections 8.1.2 and 8.1.3 hereof, Franchisee shall also provide to the City capacity on its video on demand server equipment, up to maximum capacity of 25 hours of standard definition programming, for Government/Educational Access Programming (defined below), such that VOD-enabled Subscribers will be able to select and watch such programs on a program-by-program basis using the video on demand system that Franchisee uses to offer other programming on a video on demand basis. Notwithstanding the preceding sentence, however, Franchisee's obligation under said sentence shall be limited to the provision of capacity for Government/Educational Access Programming which is delivered by the City in properly encoded form for use in video on demand systems. As used in this Section 8.1.7.3, the term Government/Educational Access Programming means programming which is, has been or could be provided on a Government/Educational Access Channel in accordance with the terms of this Agreement and applicable law.

8.1.7.4 *High Definition Access Channel:* Upon no less than ninety (90) days written notice from the City to Franchisee, one of the Government/Educational Access Channels being provided by Franchisee pursuant to this Section 8 shall, at the City's option, be provided in high-definition format (with a minimum resolution of 720p or 1080p resolution, the choice of such resolution to be at the City's option, provided such format is being used by Franchisee for at least five other high-definition programming services on the System). If the City is not capable of producing and delivering programming in the selected high definition format by the date described in the preceding sentence, then the obligation of Franchisee to transmit such programming in said format shall be delayed until such capability is achieved.

8.1.8 *Community Access Organizations:* The Manhattan Borough President has designated an independent, not-for-profit, nonmembership corporation, organized pursuant to the New York Not-for-Profit Corporation Law, to serve as the CAO for the Borough, under whose jurisdiction the Public Access Channels shall be placed for purposes of Article 8 of this Agreement. The CAO shall undertake such activities and shall adopt such rules and regulations as are required, and may adopt rules and regulations not inconsistent with this Agreement, the CAO Agreement (as hereinafter defined), a form of which is attached as Appendix C to this Agreement, the Certificate of Incorporation of the CAO, the By-Laws of the CAO, the rules and regulations of the NY PSC, and applicable law. The CAO shall maintain tax-exempt status under Section 501(c) of the Internal Revenue Code of 1986, as amended.

8.1.9 *Use of Public Access Channels.* The Public Access Channels for the Borough shall be under the jurisdiction of the CAO. Such Public Access Channels shall be used for the purpose of distributing noncommercial services by the public, any other charitable, nonprofit purpose or other similar purpose, including, without limitation, the generation of revenues by activities reasonably related to such uses and purposes, or any other purpose agreed to between Franchisee and the CAO.

8.1.9.1 *Public Access Interconnection:* Franchisee shall effectuate the interconnection of any Public Access Channel facilities with the Cable System for purposes of transmitting the Public Access Channels contemplated in this Article 8 in accordance with the terms of the CAO Agreements (as hereinafter defined).

8.1.10 *No Editorial Control by Franchisee:* Consistent with applicable law, Franchisee shall not exercise editorial control over programming or distribution of services over any Access Channel used by any Person(s), so long as such Access Channel is being used for the purposes authorized herein and except where Franchisee is utilizing any such Access Channel pursuant to the fallow time provisions of the Cable Law.

8.1.11 *Access Channel Quality:* Each Public and Government/Educational Access Channel shall be delivered with transmission quality at least the same as the transmission quality of any other channel on Franchisee's Basic Service tier of service that is not an Access Channel; provided, however, that Franchisee shall have no responsibility to improve upon or modify the quality of any Public or Government/Educational Access Channels content provided to Franchisee by

any Public or Government/Educational Access Channel programmer.

8.1.12 *Public Access Video on Demand and High Definition:* In addition to, and not in lieu of, the requirements described above in Sections 8.1.7.3 and 8.1.7.4, to the extent that Franchisee and the CAO have agreed pursuant to separate agreement that Franchisee will provide video on demand and/or high definition, such agreements by Franchisee shall be considered obligations of Franchisee hereunder as if expressly included herein.

8.2 *Government and Educational Access Grant:* Franchisee, together with the other TWC Franchisees, shall provide a combined, annual grant payable to the City to be used in support of the local Government/Educational Access Channel capital needs (the "Annual G/E Grant"). The amount of each Annual G/E Grant shall be an amount calculated by dividing Six Million Fifty Thousand Dollars ($6,050,000.00) by the number of payment due dates which are scheduled to occur prior to July 18, 2020. The first such annual payment shall be due on the sixtieth (60th) day after the Effective Date and each subsequent annual payment shall be due on the sixtieth (60th) day after each anniversary of the Effective Date.[1] Such grant shall be used solely by the City for Government/Educational Access Channel capital costs. Upon request by Franchisee, the City shall provide Franchisee with a complete accounting annually of the distribution of funds granted pursuant to this Section 8.2. In addition, Time Warner Franchisees will collectively pro-

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[1] If, for example, the Effective Date occurs before May 19, 2012, the amount of each Annual G/E Grant will be $672,222.

vide $1.7 million of in-kind support through the cablecasting of thirty second PSAs regarding WNYE's channels as follows:

Year	Amount	# of PSAs @ 500
1	$475,000	950
2	432,000	865
3	432,000	865
4	60,000	120
5	60,000	120
6	60,000	120
7	60,000	120
8	60,000	120
9	60,000	120

8.3 *Community Access Grant:* Franchisee shall pay to the CAO certain funding (the "CAO Grant") pursuant to the terms of a Community Access Organization Grant and Use Agreement by and between the CAO and Franchisee (the "CAO Agreement"), substantially in the form attached hereto as Appendix C. Franchisee and the City acknowledge and agree that, consistent with applicable federal and state law, the City shall not exercise any editorial control over any programming carried on any Access Channels set aside for the CAO pursuant to this Agreement or the CAO Agreement. The CAO Grant, or any portion thereof, shall not constitute or be treated as a deduction or credit against Franchise Fees payable to the City by Franchisee pursuant to this Agreement (nor shall any provision of services or funds to the City pursuant to this Agreement constitute or be treated as such a deduction or credit).

8.4 *Franchisee PEG Liability Immunity:* In accordance with 47 U.S.C. §558, Franchisee shall not incur any liability arising from or in connection with any Access Channels.

8.5 *Recovery of Costs:* To the extent permitted by federal law, Franchisee shall be allowed to recover the costs of the grants referenced in this Article 8 and Section 5.6 from Subscribers and to include such costs as a separately billed line item on the applicable Subscribers' bills. Without limiting the forgoing, if allowed under state and federal laws, Franchisee may externalize, line-item, or otherwise pass-through interconnection and any franchise-related costs to Subscribers.

* * *

13. TRANSFER OF FRANCHISE

13.1 *City Approval Required:* The ownership and control structure of the Franchisee as of the date of execution of this Agreement is set forth in Appendix B hereof. Subject to the provisions of this Article, Franchisee shall apply to the City for approval of any transaction in which any change is proposed with respect to ten percent (10%) or more for voting interests or twenty-five percent (25%) or more for non-voting interests of the ownership of Franchisee, the Cable System, the Cable System assets, or the Franchise by submitting FCC Form 394 or such other form as the FCC may prescribe for that purpose; provided, however, that the foregoing requirements of this Section 13.1 shall not be applicable with respect to: (a) transfers of any ownership interests expressly permitted in the "Permitted Transfers" section, if any, of Appendix B; or (b) which are effectuated as a result of any transactions involving the exchange of publicly traded

shares. The application shall be made at least one hundred twenty (120) calendar days prior to the contemplated effective date of the transaction. Such application shall contain complete information on the proposed transaction, including details of the legal, financial, technical, and other qualifications of the transferee. At a minimum, the following information must be included in the application:

13.1.1 all information and forms required under federal law;

13.1.2 any shareholder reports or filings with the Securities and Exchange Commission that pertain to the transaction;

13.1.3 a report detailing any changes in ownership of voting or non-voting interests of over five percent (5%);

13.1.4 other information necessary to provide an accurate understanding of the financial position of the Cable System before and after the proposed transaction;

13.1.5 information regarding any potential impact of the transaction on Subscriber rates and service; and

13.1.6 any contracts that relate to the proposed transaction as it affects the City and, upon request by the City, all documents and information that are related or referred to therein and which are necessary to understand the proposed transaction; provided, however, that if Franchisee believes that the requested information is confidential and proprietary, then Franchisee must provide the following documentation to the City: (i) specific identification of the information; (ii) a statement attesting to the reason(s) Franchisee believes the information is confidential;

and (iii) a statement that the documents are available at Franchisee's designated offices for inspection by the City.

* * *

15. DEFAULT AND REMEDIES

15.1 *Defaults.* In the event of any breach, default, failure or other noncompliance by Franchisee in the performance of any obligation of Franchisee under this Agreement (each such breach, default, failure or other noncompliance being referred to herein as a "Default"), which Default is not cured within the specific cure period provided for in this Agreement (or if no specific cure period is provided for in this Agreement then within the cure period described in Section 15.3 below), then the City may:

15.1.1 make a demand upon the Performance Bond pursuant to the provisions of Section 15.9 herein;

15.1.2 draw down on the Letter of Credit pursuant to the provisions of Section 15.10 herein;

15.1.3 cause a withdrawal from the cash Security Fund, pursuant to the provisions of Section 15.11 herein;

15.1.4 pursue any rights the City may have under the Guaranty;

15.1.5 seek and/or pursue money damages from Franchisee as compensation for such Default (including, as applicable, liquidated damages as contemplated in Section 15.13 hereof);

15.1.6 seek to restrain by injunction the continuation of the Default; and/or

15.1.7 pursue any other remedy permitted by law, or in equity, or as set forth in this Agreement; provided, however, that the City shall only have the right to terminate this Agreement upon the occurrence of a Revocation Default (defined hereinafter).

* * *

APPENDIX B

COMMUNITY ACCESS ORGANIZATION ("CAO")

GRANT AND USE AGREEMENT

BY AND BETWEEN

TIME WARNER ENTERTAINMENT COMPANY, L.P.

AND

MANHATTAN COMMUNITY ACCESS CORPORATION

D/B/A MANHATTAN NEIGHBORHOOD NETWORK

CAO GRANT AND USE AGREEMENT

THIS AGREEMENT (the "Agreement") made on this ___ day of _____, 2011, is entered into by and between Time Warner Entertainment Company, L.P., a limited partnership duly organized under the applicable laws of the State of Delaware and Time Warner NY Cable LLC a limited liability company duly organized under the applicable laws of the State of Delaware (together referred to herein as "Time Warner Cable"), with their place of business at 120 East 23rd Street, New York, New York 10010 and Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network, a New York not-for-profit corporation (the "CAO") designated by the Borough President of Manhattan (the "Borough President"), with a place of business at 537 West 59th Street, New York, New York 10019.

WHEREAS, the City of New York (the "City"), is entering into Franchise Agreements granting Time

Warner Cable nonexclusive franchises ("Franchise Agreements") to operate a Cable System (the "System") in the Borough of Manhattan (service area hereinafter defined); and

WHEREAS, Time Warner Cable has directly and independently negotiated with the CAO and has agreed to provide the CAO with the grants and services pursuant to the terms hereof for the benefit of the Residents of the Borough of Manhattan; and

WHEREAS, the Franchise Agreement requires Time Warner Cable to make available CAO Access Channels on the System, to be known as public access channels ("Public Access Channels"), to fulfill certain technical requirements with respect to such channels and to provide to the CAO any support payments and Cash Grants (as hereinafter defined) as may be agreed upon between the CAO and Time Warner Cable as described herein; and

WHEREAS, the CAO is a not-for-profit corporation organized pursuant to New York State law and has been designated by the Borough President as the CAO to receive such grants as shall be made available by Time Warner Cable pursuant to this Agreement; and

WHEREAS, the CAO has been organized to operate for charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1954, as amended (the "Code"), including, among other purposes, the administration and management of Public Access Channels in the Borough, and such other purposes which shall qualify the CAO as exempt under Section 501(c)(3) of the Code; and

WHEREAS, the CAO shall obtain the funds necessary to carry out its purposes and objectives from

the grants provided for herein and from any other lawful sources; and

WHEREAS, Time Warner Cable desires to support the purposes and objectives of the CAO in the CAO's objectives of the development and production of public services and programming to be distributed on the Public Access Channels and to be made available to all cable television subscribers in the Borough of Manhattan; and

WHEREAS, the CAO will engage in activities and will develop programming to be distributed on the Public Access Channels for the benefit of Subscribers to the System, thereby increasing the public service potential of cable television in the City;

NOW THEREFORE, in consideration of the foregoing clauses, which clauses are hereby made a part of this Agreement, and the mutual agreements herein contained, the parties agree as follows:

* * *

SECTION II - GRANT OF SUPPORT TO THE CAO

2.1 Public Access Channel Grant

2.1.01 Time Warner Cable shall make a Public Access Channel grant to be used in support of the CAO's development and production of local public access programming ("Public Access Channel Grant").

2.1.02 The Public Access Channel Grant provided by Time Warner Cable hereunder shall be in the form of a per month, per Subscriber grant for the Term of the Franchise Agreement in accordance with the following schedule:

Year 1 - Year 2: The Public Access Channel Grant shall be in the amount of NINETY CENTS ($.90) per month, per Subscriber until the second anniversary of the Effective Date:

Year 3 - Year 5: The Public Access Channel Grant shall increase to and remain at ONE DOLLAR AND FIVE CENTS ($1.05) per month, per Subscriber until the fifth anniversary of the Effective Date;

Year 6-8: The Public Access Channel Grant shall increase to and remain at ONE DOLLAR AND TWENTY-FIVE CENTS ($1.25) per mouth, per Subscriber until the eighth anniversary of the Effective Date;

Year 9 Forward: The Public Access Channel Grant shall increase to and remain at ONE DOLLAR AND THIRTY CENTS ($1.30) per month, per Subscriber until Time Warner Cable no longer operates under the Franchise Agreement or under any subsequent Temporary Operating Authority authorized by the NYS Public Service Commission.

The per-month, per-Subscriber payments detailed herein will be calculated based on the number of Subscribers to Time Warner Cable Basic Service tier in the Borough. The Public Access Channel Grant payment, along with a brief summary of the Subscriber information upon which it is based certified by a financial representative of Time Warner Cable, shall be delivered to the CAO within forty-five (45) days after the end of each calendar quarter. Time Warner Cable shall file a copy of said statement with DoITT.

2.1.03 Subject to Section 2.5, each Public Access Channel Grant payment shall be non-refundable.

2.1.04 The failure of the CAO to fully allocate or expend any monies provided pursuant to this Section 2.1 shall not affect Time Warner Cable's payment obligations under this Section 2.1.

2.1.05 The other provisions of this Section II notwithstanding, in no event shall the Public Access Channel Grant rate provided by Time Warner Cable per subscriber exceed in any month the Public Access Channel Grant per subscriber rate paid to the CAO by Verizon.

2.2 Cash Grant

2.2.01 Time Warner Cable shall make cash grants to the CAO (each, a "Cash Grant") payable as follows:

> TWO MILLION FIVE HUNDRED THOUSAND DOLLARS ($2,500,000.00) shall be due and payable within thirty (30) days of the Effective Date;
>
> FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) shall be due and payable within thirty (30) days of the first anniversary of the Effective Date;
>
> SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) shall be due and payable within thirty (30) days of the fourth anniversary of the Effective Date; and
>
> SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) shall be due and payable within thirty (30) days of the fifth anniversary of the Effective Date.

2.2.02 Each Cash Grant shall be non-refundable.

2.2.03 The failure of the CAO to fully allocate or expend any monies provided pursuant to this Section

2.2 shall not affect Time Warner Cable's payment obligations under this Section 2.2.

2.3 Use of Funds

Such Public Access Channel Grant and Cash Grant shall be used by the CAO in its discretion for public access costs, including, but not limited to, studio and portable production equipment, editing equipment and program playback equipment, cameras, office equipment, renovation or construction of Public Access Channel facilities, local public access programming development by the CAO, and other public access costs as may be determined by the CAO and its Board of Directors.

* * *

2.8 Additional Obligations of Time Warner Cable

2.8.01 Each Public Access Channel provided in Section 4.2 shall be delivered with transmission quality compliant with all applicable FCC standards and at least the same as the transmission quality of any other channel on Time Warner Cable's tier of service that includes local broadcast channels, provided, however, that Time Warner Cable shall have no responsibility to improve upon or modify the quality of any Public Access Channel's content provided to Time Warner Cable by the CAO.

2.8.02 Subject to the service availability requirements set forth in the Franchise Agreement, Time Warner Cable shall provide to the CAO, without charge, one service outlet activated for Basic Service at each of the following CAO's locations: 537 West 59th Street, New York, New York 10019 and 175 East 104th Street, New York, NY. Cable Service may not be resold or otherwise used in contravention of Time

Warner Cable's rights with third parties respecting programming. Equipment provided by Time Warner Cable, if any, shall be replaced at retail rates if lost, stolen or damaged.

2.8.03 In the event that Time Warner Cable does collect for itself specific standalone public access viewership information, Time Warner Cable may make such specific information available to the CAO at the CAO's cost and expense subject to any limitation of applicable law including, without limitation, 47 U.S.C. §551.

2.8.04 To the extent technically feasible and commercially reasonable, Time Warner Cable shall display Public Access Channel program content titles in electronic on-screen channel listings in the same manner as it designates all other programming on the System; provided, however, that, Time Warner Cable shall not be responsible for any inaccuracies in such information.

2.8.05 In the event Time Warner Cable is required by law or regulation to adhere to technical standards not currently necessary for the production or distribution of the CAO's programming over the System, and such requirement necessitates the acquisition of new equipment not currently contemplated by the parties hereto, Time Warner Cable shall make such equipment available at no cost to the CAO.

2.8.06 Time Warner Cable will provide 100 "avails" or listing of spots each month for the CAO to use for promotional or public interest purposes.

SECTION III - OBLIGATIONS OF THE CAO

3.1 Cash Grant and Public Access Channel Grant; Use for Educational or Charitable Purposes

The CAO shall: (i) administer and manage the Public Access Channels provided for its use by Time Warner Cable and the use of the CAO's facilities, equipment, and supplies in a fair and reasonable manner; and (ii) develop and support programming to be cablecast on the Public Access Channels, which is responsive to the needs and interests of the Residents of the Borough. The CAO shall use the Public Access Channels and the Cash Grant and Public Access Channel Grant provided by Time Warner Cable to the CAO primarily for educational or charitable purposes within the meaning of Section 501(c)(3) of the Code, and as deemed necessary by the Board of Directors of the CAO.

3.2 Maintenance of Tax-Exempt Status

The CAO shall conduct its activities so as to maintain its tax exempt status under Section 501(c)(3) of the Code or other applicable laws.

3.3 Public Access Channel Rules and Regulations

3.3.01 The CAO shall maintain reasonable rules and regulations to provide for open access to Public Access Channel time, facilities, equipment, supplies, and training on a non-discriminatory basis and to the extent required by applicable law. Said rules and regulations providing for open access may dedicate segments of Public Access Channel time and/or specific channels to particular or related subject matters or uses.

3.3.02 If the CAO provides programming grants, it shall establish reasonable rules and regulations

governing the procedure for applying to the CAO) for such grants and the selection of grant recipients by the CAO.

3.3.03 The CAO shall make all rules and regulations publicly available.

* * *

SECTION IV - PUBLIC ACCESS CHANNEL SERVICES

4.1 Compliance with Federal, State and Local Law

Time Warner Cable and the CAO shall comply with all applicable local, state, and federal laws with respect to program content on the Public Access Channels.

4.2 Public Access Channel Set Aside

4.2.01 Time Warner Cable shall carry Public Access Channels as provided in its franchise, including, without limitation, Section 8.16(a) of the Franchise Agreement. Two of such channels shall be carried on Time Warner Cable's system in high definition ("HD") 1080P format. Time Warner Cable shall initially carry the programming on each of the respective Public Access Channels as indicated in Appendix J to the Franchise Agreement. Time Warner Cable shall not arbitrarily or capriciously change such channel assignments and Time Warner Cable shall minimize the number of such changes. However, Time Warner Cable may change such channel assignments as it deems appropriate so long as (i) Time Warner Cable gives the CAO ninety (90) days notice of such change (if commercially practicable) but in no event less than forty-five (45) days, unless the change is required by law and there is no reasonable opportunity to provide such

notice; and (ii) Time Warner Cable provides, free of charge, notice of such changes that shall include (a) to the extent Time Warner Cable has availability, giving notice of such Public Access Channel changes on advertising inserts on local channels carrying non-satellite programming in prime time at least thirty (30) seconds per day, for the time period of thirty (30) to fifteen (15) days prior to such change and two (2) minutes per day for the fourteen (14) days prior to such change (provided, however, that if Time Warner Cable does not have advertising availability at the commencement of the thirty (30) to fifteen (15) day period, as soon as advertising space becomes available, Time Warner Cable shall then provide the advertising contemplated under this Section 4.2.01), and (b) providing notice of such changes in at least two (2) monthly Subscriber bill inserts prior to such change (if commercially practicable) but in no event less than one (1) monthly Subscriber bill insert; provided, however, that such bill inserts shall not be necessary in the event Time Warner Cable provides the requisite notice of such changes to all Subscribers in a letter separate from their bill. If Time Warner Cable changes the channel location of any Public Access channel, the location after such change shall be contiguous with other Public Access channels.

4.2.02 The provisions of 16 NYCRR §895.4 (c)(12) shall apply to this Agreement.

4.2.03 During the term of its franchise, for as long as Time Warner Cable makes video on demand ("VOD") programming available on its system in Manhattan, it will include in the VOD programming available at any given time at least 25 hours of public access programming selected by the CAO, provided such programming is provided to Time Warner Cable by

the CAO in an encoded format so that it can be accessed by Time Warner Cable customers from the VOD platform without further technical or formatting modification by Time Warner Cable. This twenty five hours of public access programming will be available to Time Warner Cable customers at any time, 24 hours per day, seven days a week. It is agreed that this is a designation of channel capacity for public access use but not an offset of the total number of channels required in the Franchise Agreement, Time Warner Cable will provide, upon request and to the extent practical and permitted by law, any aggregate data regarding subscriber use of the CAO's programming on the VOD platform.

* * *

SECTION V - MISCELLANEOUS PROVISIONS

5.1 Effective Date and Term

5.1.01 This Agreement shall take effect on the Effective Date.

5.1.02 This Agreement shall remain in effect throughout the Term of the Franchise Agreement, as provided in the Franchise Agreement, provided that the designation of the CAO by the Borough President remains in effect. The period of time during which this Agreement is in effect shall be "the term of this Agreement." In the event that the Franchise Agreement is terminated for any lawful reason prior to the scheduled expiration of the Term, then the term of this Agreement shall expire and all rights and obligations of the CAO and Time Warner Cable under this Agreement shall cease. Notwithstanding the foregoing, in the event Time Warner Cable continues to provide Cable Service in the Service Area, after the termination or expiration of the Term of the Franchise Agreement

pursuant to any Temporary Operating Authority from the NY Public Service Commission, then Time Warner Cable shall be bound by all of the obligations under this Agreement for the period of such continuing provision of Cable Service in the Service Area.

5.2 Application to Successors

This Agreement shall bind and benefit the parties hereto and their respective heirs, beneficiaries, administrators, executors, receivers, trustees, successors and assigns.

* * *

No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

vs.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

MNN and its employees are not state actors under any of this Court's state action tests. Respondents and their *amici* now ask the Court to apply a new test (different even from the Second Circuit's analysis)—one that would expand the state action doctrine and have far-reaching consequences on the distinction between the private and public spheres. The Court should reject this invitation.

Respondents inundate the Court with new allegations that appear nowhere in their Amended Complaint[1] and with arguments never made below. But Respondents cannot divorce themselves from their pleading on an appeal from a motion to dismiss. And their Amended Complaint failed to allege plausibly that the challenged conduct was fairly attributable to the state. Indeed, other than designating MNN (28 years ago) to operate channels that would otherwise have been operated by Time Warner Cable and having the ability to nominate two members (out of thirteen) of MNN's board, the City is not alleged to have any connection with MNN. Respondents did not allege that the City was involved in MNN's policies, programming, or practices—and they certainly did not allege that the City was involved in the conduct they challenged.

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[1] These improper new allegations—many of which cite to an anonymous blog for support—concern MNN's prior community grant program and *ad hominem* attacks against MNN's Executive Director. Brief for Respondents 10-12 & n.3 ("Resp. Br.").

Respondents urge this Court to determine (as the Second Circuit did)—*on the pleadings*—that public access channels are, as a matter of law, *constitutional* public fora. Neither the Amended Complaint, the law, nor the facts support their argument. If producers, like Respondents, want to challenge MNN's decisions, they have a perfectly good venue for doing so at the New York State Public Services Commission. But this case has never belonged in federal court.

ARGUMENT

I. MNN IS NOT A STATE ACTOR

Respondents abandon the Second Circuit's reasoning and now argue that MNN is a state actor under an expanded version of the public function test or under a new theory of delegation. Neither argument works.

A. *The City Did Not Delegate a Public Function to MNN*

Respondents suggest that the Manhattan Borough President's 1991 designation of MNN to run Manhattan's public access channels is somehow akin to the state prison outsourcing its medical care of prisoners to a private doctor in *West v. Atkins*, 487 U.S. 42 (1988). Resp. Br. at 52-53. But the situations are completely different: North Carolina prisons have a *constitutional* (and statutory) obligation to provide medical care to inmates. 487 U.S. at 54-55 & n.13. The prison in *West* satisfied these obligations by contracting with a private physician to provide medical services. *Id.*

Here, by contrast, New York City has no constitutional duty to operate public access channels. Nor does the City have a statutory or regulatory obligation to operate public access channels. Instead, the relevant New York State regulation requires franchisees, i.e., *cable operators*—not municipalities—to set aside PEG channels. 16 NYCRR § 895.4(b). Those same regulations require that *cable operators*—not municipalities—operate those channels unless and until the municipality designates a third party to operate them. *Id.* at § 895.4(c)(1). The state regulation never contemplates—much less requires—that a municipality itself would ever operate a public access channel. The Borough President's designation was therefore not the outsourcing of any constitutional, statutory, or regulatory obligation of the City to a private entity.[2] Rather, it was simply a decision about who should run the public access channels: the cable operator or a third party.

This Court has made clear that where, as here, a regulatory scheme imposes an affirmative obligation not on the municipality but *on a private entity*, the state is not delegating a public function in any way that would render the private entity a state actor. Indeed, in this same scenario, Justice Rehnquist explained in *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974):

> If we were dealing with the exercise by [a private entity] of some power delegated to it by the State which is traditionally asso-

---

[2] Before state regulations allowed the City to designate an entity to run the public access channels, they were operated by the cable companies. *See* Brief of New York County Lawyers Association as *Amicus Curiae* in Support of Respondents at 15-25.

> ciated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated entities, *it imposes no such obligation on the State.*

Id. at 352-53 (emphasis added). The Court reaffirmed this principle in *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), finding no delegation of a public function where "nothing in Pennsylvania's Constitution or statutory scheme obligates *the State* to provide either medical treatment or workers' compensation benefits to injured workers. ... Instead, the State's workers' compensation law imposes that obligation on *employers*." *Id.* at 55-56 (emphasis added). That is exactly the situation here. The PSC regulations demand nothing of the City but require the cable operator to set aside channels for public access.

B. *Respondents' Proposed Public Function Analysis is Flawed*

Respondents also argue that the operation of a "public forum" satisfies the public function test. Resp. Br. at 53-59. But this argument fails for multiple reasons.

Recognizing that the public function test has "carefully confined bound[aries]," *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 163 (1978), this Court has always made a careful determination of whether the specific "function" at issue is a "traditional" and "exclusive" function of government. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 309 (2001) (Thomas, J., dissenting) (apply-

ing public function test by examining statutory schemes and historical data to determine whether governing interscholastic sports is a traditional and exclusive role of government); *Sullivan*, 526 U.S. at 55-57 (considering historical data and statutory scheme in applying the public function test); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (analyzing Massachusetts statutes and history to determine whether provision of education for maladjusted high school students was traditionally done by the government alone); *Flagg Bros.*, 436 U.S. at 159-63 (considering historical and statutory context to determine whether government had monopoly over settlement of disputes between debtors and creditors).

Clearly the operation of a public access television station is neither a traditional nor exclusive government function. The *Denver Area* plurality acknowledged that public access channels have been run by a variety of entities: nonprofits, cable operators, and municipalities. *Denver Area Educ. Telecom. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 761 (1996). And in New York, the state regulations only contemplate the cable operator or a third party operating these channels. Indeed, in Manhattan, this function has *never* been governmental: either the cable operator or MNN has run the public access channels. Resp. Br. at 37. As a result, empirically, operating public access channels does not satisfy the public function test.

Recognizing this infirmity, Respondents propose a new and much broader formulation of the public function test. They argue that the Court should consider the function: <operation-of-a-public-forum-*in-general*>, rather than <operation-of-a-public-access-channel>, when applying the public function test.

But how can MNN be engaging in a function that is traditionally and exclusively a function of government if, *empirically*, what MNN is *actually* doing (<operation-of-a-public-access-channel>) is ***not*** a traditional and exclusive government function?

The Court has always focused on the *specific* function at issue, and for good reason. Depending on how broadly one defines the "public function," many private activities would, for example, fall under "promot[ing] the general Welfare" or "secur[ing] the Blessings of Liberty." U.S. Const. pmbl. And the broader the function considered, the more likely ostensibly private conduct would be drawn in as state action. If, for example, in *Rendell-Baker*, the inquiry had been broadened to consider whether the provision of *public education* was a traditional and exclusive role of government, the Court may well have reached a different result than it did. *Contra Rendell-Baker*, 457 U.S. at 842. As it has for the last 50 years, the Court chose to engage in the narrower inquiry with "carefully confined bound[aries]." *Flagg Bros.*, 436 U.S. at 163.

Respondents also seek to draw an analogy to government administration of quintessential public fora: streets, parks, and sidewalks. But these spaces are *sui generis*—they "occup[y] a special position in terms of First Amendment protection." *U.S. v. Grace*, 461 U.S. 171, 180 (1983). Public access channels are not historically operated by the government and are simply not the same as streets, parks, and sidewalks. And MNN's operation of the public access channels is not analogous to providing parade permits or operating a public park. If a city delegated the parade permit process to a private entity, it might well be deemed a state actor under the public

function test for carrying out a traditionally exclusive government function.

In addition, Respondents' argument still puts the cart before the horse. It requires a *predicate* finding that Manhattan's public access channels are, in fact, *constitutional* designated public fora—without first determining the nature of the entity operating (and, more importantly, controlling) the forum. Just as in *Lebron*, where it was necessary for the Court to determine *first* that Amtrak was a state actor (or part of the government), rather than whether Amtrak's bulletin board in Penn Station was a constitutional public forum, it is necessary here to determine first whether MNN is a state actor. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383-400 (1995).

Moreover, determining whether something is a designated public forum is no walk in the park (as it were), *particularly on the pleadings*. It requires a showing that the government not only opened a space for speech but maintains control of that space. *See, e.g., Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). It is no surprise that over the past 50 years, this Court has found less than a handful of instances where the facts sufficiently demonstrated the creation of a *constitutional* designated public forum.

Respondents argue that this Court previously adopted their argument in *Marsh v. Alabama*, 326 U.S. 501 (1946). But they fail to acknowledge that *Marsh* was strictly limited to its facts, *i.e.*, a private company's operation of a company town, an "economic anomaly of the past." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 561 (1968); *see also Flagg Bros.*, 436 U.S. at 159 (recognizing "limited reach" of *Marsh* to its

facts); *Hudgens v. N.L.R.B.*, 424 U.S. 507, 516-20 (1976) (abrogating *Food Emps. v. Logan Valley Plaza*, 391 U.S. 308 (1968), which sought to expand *Marsh's* holding to a private shopping mall). Respondents do not allege that MNN is operating anything remotely like a company town. *Marsh* is therefore inapplicable.

Respondents point to no case where this Court has applied the public function state action test to a vague and amorphous function such as <operation-of-a-public-forum-*in-general*>. *Cf.* Pet. Br. 45. They ask the Court to break new ground and radically expand the public function test, thereby eviscerating the test's "carefully confined bound[aries]." *Flagg Bros.*, 436 U.S. at 163. The Court has no reason to do so here.[3]

II. MANHATTAN'S PUBLIC ACCESS CHANNELS ARE NOT CONSTITUTIONAL PUBLIC FORA

Respondents argue that the "structure" and "nature" of New York's public access channels warrant a finding that they are designated public fora, without any reference to state action whatsoever. Resp. Br. at 24-26. But Respondents rely on a series of incorrect assumptions and unfounded logical leaps. Tellingly, every designated public forum case Respondents cite involves fora that were unquestionably controlled by the government itself. Resp. Br. at 23-26.

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[3] At one point Respondents appear to argue "joint action" with the City (Resp. Br. at 57-58), but do not allege *any* City participation in the challenged conduct. They also acknowledge that the mere allegation that MNN's "existence derives from sovereign acts" would be insufficient (which it is, under *Lebron*, 513 U.S. at 399-400). Resp. Br. at 58.

A. *The PSC Regulations Do Not Create Constitutional Public Fora*

Respondents' main argument is that New York's "first-come, first-served, nondiscriminatory" regulation for public access automatically creates *constitutional* designated public fora—even without a requisite showing of state action. Resp. Br. 26-32. This is wrong for several reasons.

1. Respondents Misconstrue "First-Come, First-Served"

Respondents are simply wrong about what "first-come, first-served," "nondiscriminatory" means in the PSC regulations. Respondents argue that the "first-come, first-served" language strips MNN of all editorial discretion. It is that lack of editorial discretion, according to Respondents, that renders MNN's channels designated public fora. Resp. Br. at 29. They contrast this lack of discretion with other public access channels that are allowed to "curate" content. *Id.* at 30-31.

This is a false distinction. In fact, MNN *is* able to curate content on its public access channels. This authority comes directly from the Grant Agreement, which provides that MNN "may dedicate segments of Public Access Channel time and/or specific channels to particular or related subject matters or uses." Resp. App. at 31a, § 3.3.01; *see also id.* at § 3.1 ("[MNN] shall ... (ii) develop and support programming to be cablecast on the Public Access Channels, which is responsive to the needs and interests of the Residents of the Borough."). In addition to being able to curate content, MNN, like other access organizations, also produces its own original program-

ming, over which it has full editorial control. *See id.* at 26a, 31a, § 3.1.

The PSC also approved the Franchise Agreement, which attached a copy of the Grant Agreement. 16 NYCRR § 895.1 (discussing requirements for franchise to be confirmed or approved by PSC). In addition, the PSC has specifically ruled that public access channel operators in New York *may* curate content and produce (and air) their own shows. *See, e.g., Amano v. City of New York*, No. 04-V-0321, 2006 WL 4470759, at *3-5 (N.Y.P.S.C. Aug. 30, 2006) (allowing New York public access channel operator to curate and place content on specific channels). Thus, the distinction Respondents try to draw—between MNN on one end of the spectrum, and "[m]ost other states" that "allow public access channels to curate content" (Resp. Br. at 1), on the other end—is factually wrong and, in any event, irrelevant.[4]

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[4] Other state and local schemes do not "differ markedly from New York's [public access scheme]." Brief Amici Curiae of the American Civil Liberties Union et al. at 13-15 ("ACLU Br."). Respondents argue that there "is no evidence that Illinois or Chicago has adopted a first-come, first-served policy." Resp. Br. at 44 n.18. But, much like the PSC regulations, Chicago Municipal Code § 4-280-360(A)(2) states unequivocally that CAC is to "[a]llocate access channel space and time, and access channel interconnections for nonprofit use, on a reasonable ***nondiscriminatory*** basis" (emphasis added). Similarly, the local Idaho statute the ACLU cites is an Educational and Government access channel, ***not*** a "public access channel." ACLU Br. at 13-14 (citing Coeur d'Alene, Idaho, Mun. Code § 2.100.010). Moreover, that local municipalities in Tennessee and Ohio allow public access channels to air content of local relevance (ACLU Br. at 14) is no different than MNN's mandate to curate and create content "responsive to the needs and interests of the Residents of the Borough." Resp. App. at 31a, § 3.1. None of these

A perverse consequence of Respondents' argument would be that the cable operators (Time Warner Cable, Comcast, etc.), which are expressly forbidden from having any editorial control over public access channels under the 1984 Cable Act, 47 U.S.C. § 531(e), would all necessarily be state actors wherever they operate public access channels (as they do in many states including New York).

Respondents' argument that New York's "first-come, first-served" regulation is what creates a public forum is also inconsistent with the Second Circuit's decision. The Second Circuit *did not* find that this requirement was unique to New York, nor did it hold that the requirement rendered public access channels in Manhattan public fora. *See* Pet. App. 3a-5a, 13a-15a. Respondents' brief glosses over what the Second Circuit actually found relevant in finding that MNN operated a public forum.

2. The City Does Not Own Or Control Manhattan's Public Access Channels

Recognizing that a *constitutional* designated public forum is a "government-controlled space[]" (*Minnesota Voters*, 138 S. Ct. at 1885), Respondents argue for the first time that New York "owns and controls its public access channels." Resp. Br. at 33. But the Amended Complaint is devoid of any such allegation, and neither Respondents nor the courts below ever considered these public access channels anything other than privately-owned. *See* Brief for Plaintiffs-Appellants at 16-20, *Halleck v. Manhattan Cmty. Ac-*

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examples indicate that MNN has any less editorial discretion than other public access channel operators.

cess Corp., No. 16-4155 (2d Cir. Feb. 2, 2017) (Doc. 1960753); Reply Brief for Plaintiffs-Appellants at 6-8, *Halleck v. Manhattan Cmty. Access Corp.*, No. 16-4155 (2d Cir. Mar. 23, 2017) (Doc. 1996166); Pet. App. 9a, 11a-13a (citing *Denver Area*, 518 U.S. at 742, 791-94, 826-31); Pet. App. 44a-45a, 48a-49a.

Respondents' new *ownership* argument—made without a factual record *or even allegations*—mischaracterizes the Franchise Agreement. That agreement did not "create" any public access channels for the City to "own" or "control," nor did it include any transfer of property rights to the City. Rather, as part of the agreement, Time Warner Cable agreed to set aside bandwidth on the system *it owns* for public access use by MNN, not the City. *See, e.g.*, Resp. App. at 25a (representing that "the Franchise Agreement requires Time Warner Cable to make available CAO Access Channels on [Time Warner's] System, to be known as public access channels"); *id.* at 32a-33a, ¶ 4.2.01 ("Time Warner Cable shall carry Public Access Channels as provided in its franchise....").

In *Denver Area*, Justice Thomas observed that franchise agreements do not create any such property rights in favor of the municipality, recognizing that, while "[p]ursuant to federal and state law, franchising authorities require cable operators to create public access channels, ... nothing in the record suggests that local franchising authorities take any formal easement or other property interest in those channels that would permit the government to designate that property as

a public forum." 518 U.S. at 828.[5] Moreover, MNN indisputably owns and controls the physical assets necessary for the production of content on its channels, *e.g.*, the studios, transmission facilities, cameras, and editing stations, all of which are essential to production and transmission of content on public access channels.[6] Pet. App. 37a; JA-23-25, ¶¶ 34-38.

Respondents cite several inapplicable lower court opinions to argue that some privately-owned property is "subject to a public easement." Resp. Br. at 41 n.17. But these cases involved real property—privately-owned *sidewalks*, which *pursuant to recorded agreements* between municipalities and the

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[5] Further underscoring how inappropriate it is to characterize public access channels as *constitutional* public fora, Justice Thomas explained in *Denver Area*: "in no other public forum that we have recognized does a private entity, owner or not, have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf." 518 U.S. at 829. Justice Thomas concentrated on the public access channel operator's role in accepting and scheduling programming and providing production facilities and assistance—functions MNN performs. *Id.* at 830. Justice Thomas concluded, "the[se] numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of the public forum." *Id.* at 831. Respondents' strange suggestion that Justice Thomas's dissent in *Denver Area* did not apply to public access channels is belied by the opinion. Resp. Br. at 39-40.

[6] While Respondents state that the Franchise Agreement "conferred on the City a legally-enforceable right to *place content* on Time Warner's cable system" (Resp. Br. at 43 (emphasis added)), this would be true only in connection with Government/Educational Access Channels, not Public Access. Resp. App. at 15a-16a, §§8.1.7.2-.4.

private owners, were made available for public use. *See First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1118, 1131 (10th Cir. 2002); *Venetian Casino Resort, LLC v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 948 (9th Cir. 2001).

Moreover, streets, sidewalks, and parks are in their own constitutional category because they are the "archetype of a traditional public forum" (*Frisby v. Schultz*, 487 U.S. 474, 480 (1988)), "hav[ing] immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). And this Court "has rejected the view that traditional public forum status extends beyond its historic confines." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) (quoting *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998)).

Therefore, any attempt to equate streets and public access television channels—which are just a few decades old—fails. *See, e.g., U.S. v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205-06 (2003) (Internet access in public libraries "did not exist until quite recently"; "[t]he doctrines surrounding traditional public forums may not be extended to situations where such history is lacking").[7]

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[7] In the sidewalk cases, the courts were persuaded by "the historically public character of [the sidewalks]" and their "interconnection with [the abutting] network of public sidewalks." *Venetian*, 257 F.3d at 943, 948. Here, to a channel surfer, Manhattan's public access channels are indistinguisha-

More importantly, Respondents' pleading does not—and cannot—allege that the City "controls" Manhattan's public access channels in any way. To the contrary, Respondents concede that the City: can nominate only two of MNN's 13 board members; has no right to create, approve, or revise MNN's internal rules; does not fund MNN or own its property or assets; and (unlike MNN) is not allowed to exercise editorial control over channel content. JA-22-23, ¶¶ 29, 33, 35-36; Resp. Br. at 6, 8-9. Indeed, Respondents have not alleged that the City has the power to exercise *any* degree of control over public access channels.

Any suggestion that the City controls the public access channel is further belied by the language of the Franchise Agreement, which defines Public Access Channels as "Access Channel[s] which Franchisee shall make available *to the CAO*." Pet. Reply App. 1a, § 1.46 (emphasis added).[8] Moreover, Sections 8.1.8 and 8.1.9 expressly state that the public access channels are under MNN's "jurisdiction" "for the purpose of distributing noncommercial services by the public [and] other charitable, nonprofit purpose...." Resp. App. 16a-17a. This is in stark contrast to the Franchise Agreement's discussion of Government/Educational Access Channels, which are placed "under the jurisdiction *of the Mayor* ... for noncommercial *use of the City [and City educational agencies]*." *Id.* at 15a, § 8.1.7.2 (emphasis added). Finally, the Grant Agreement allows MNN to "use

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ble from the *nonpublic* cable channels that precede and follow them.

[8] Respondents did not include this section of the Franchise Agreement in their appendix.

the Public Access Channels ... as deemed necessary *by the Board of Directors of [MNN].*" *Id.* at 31a, § 3.1 (emphasis added).

Ignoring this clear language, Respondents argue—for the first time—that the City somehow has "*express authority*" to remove MNN as the operator of the public access channel. Resp. Br. at 19 (emphasis added). But there is no "express" authority in either the Franchise Agreement or the PSC regulations. The operative regulations and agreements do not address removal at all; and there is no reason to infer that such authority exists.

But even if the City has the authority to replace MNN and designate another organization to run Manhattan's public access channels, so what? This speculative, latent authority is not indicative of government control. Is a private driveway a public forum because the city *could* take it by eminent domain? Congress, of course, *could* have repealed the act that gave rise to the U.S. Olympic Committee; yet, despite this latent theoretical ability to revoke the entity's designation, this Court held that it was not a state actor. *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544-47 (1987). The FCC *could* revoke a broadcaster's license, but this does not give the government power to control the station's content. Respondents' argument about hypothetical, unexercised power does not constitute the type of "control" that would make MNN a state actor or Manhattan's public access channels public fora.

3. Respondents' Attempts to Narrow the Consequences of Their Argument Fail

Respondents stress that "whether *all* public access channels are a public forum ... is simply not our argument." Resp. Br. at 29. Instead, they argue that the impact of this case is limited because New York's public access regime is "unique"—different, in specific ways that Respondents suggest are meaningful—from public access in other places. Resp. Br. at 29 & n.10 ("Our position is governed by the unique features of New York law."). But in their Amended Complaint, Respondents attributed to *all* public access channels the characteristics they now call "unique features of New York law." *Id.* Respondents alleged:

> 19. Cable public access channels typically are available for the free use of the public on a first-come, first-served, nondiscriminatory basis.

JA-20. Because this Court is reviewing the disposition of this case on a Rule 12(b)(6) motion, Respondents' pleadings cannot simply be ignored.

Moreover, nondiscriminatory access—however it is phrased—has been part of the very fabric of public access television since its inception. As early as 1972, the FCC characterized public access channels as "a specific noncommercial channel [] set aside for community use. Anyone in the community can have access to this channel on a first come, first served basis, free of charge." Barry Janes, *History and Structure of Public Access Television*, 39(3) J. Film & Video 14, 14 (1987). In *Denver Area*, Justice

Kennedy recognized that "[t]he public access channels *established by franchise agreements* tend to have certain traits. They are available at low or no cost to members of the public, often on a first-come, first-served basis." 518 U.S. at 791 (emphasis added)).

Nor is "first-come, first-served" or "nondiscriminatory" language in state or local laws or regulations (or franchise agreements) at all "unique" to New York; it is ubiquitous. *See, e.g.*, D.C. Code § 34-1251.03(28) (District of Columbia); Haw. Code R. § 16-131-32 (Hawaii); 815 R.I. Code R. 010-05-1.14.1(B)(1) (Rhode Island); Vt. Code R., tit. 30, ch. 8000, § 8.100(FF) (Vermont); Aurora, Illinois Code of Ordinances, ch. 19, § 19-41(b)(1); Chicago, Illinois Municipal Code § 4-280-360; Laurel, Maryland Code of Ordinances, ch. 5, § 5-8(b); Vienna, Virginia Code of Ordinances, ch. 24, art. 7, § 24-25(3); Guidelines for Community Television & PEG Access Policies, Foxboro Cable Access, https://www.fcatv.org/policy/#What_is_FCA.

Finally, Respondents' localism argument is a red herring. Petitioners do not argue that municipalities cannot decide for themselves how to structure public access television operations. Indeed, a channel structured with extensive, ongoing government control and involvement would command a different result. *See, e.g., Brennan v. William Paterson Coll.*, 34 F. Supp. 3d 416, 419-21, 426-30 (D.N.J. 2014) (township owned public access channel, which state university controlled and operated); *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 52-53 (D. Me. 2002) (municipality itself restricted plaintiff's speech by shutting down public access channel). Here, nothing in the Amended Complaint warrants treating New

York's public access television channels as constitutional public fora.

III. RESPONDENTS' AND THEIR AMICI'S ADDITIONAL STATE ACTION ARGUMENTS ARE LEGALLY AND FACTUALLY WRONG

Amici curiae the American Civil Liberties Union *et al.* argue that Respondents need not satisfy *any* of this Court's prior state action tests. ACLU Br. at 16-32. Rather, according to Respondents and the ACLU, MNN has no editorial discretion, its actions are therefore somehow compelled by the state, and it is therefore a state actor. *Id.* at 4-7, 10-11, 19-24.

This Court has consistently rejected that argument. That MNN is subject to regulation does not turn it into a state actor. Even where there is "extensive state regulation of private activity, we have consistently held that '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the [Constitution].'" *Sullivan*, 526 U.S. at 52 (quoting *Jackson*, 419 U.S. at 350).

Rather, "a plaintiff must show that the government compelled the *particular activity* that allegedly caused the constitutional injury." Pet. App. at 24a (Jacobs, J. dissenting) (emphasis added); *see also Jackson*, 419 U.S. at 357 (public utility regulations "do[] not transmute a practice initiated by the utility and approved by the commission into 'state action'" where the state "has not put its own weight on the side of the proposed practice by ordering it"); *Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982) (medical regulations do not "demonstrate that the State is responsible for the decision to discharge or transfer particu-

lar patients"); *see also Rendell-Baker*, 457 U.S. at 841-42 (distinguishing between state regulation of school and lack of state regulation over challenged personnel decision).[9]

Here, the constitutional injury that Respondents allege is their suspension from MNN and its facilities. JA-17, 38-39, ¶¶ 2, 128-29, 133. Neither the Grant Agreement nor the PSC regulations speak to suspensions or disciplinary actions; these are actions taken at MNN's discretion, in this case after the program had already been aired. Indeed, the Franchise Agreement between the City and Time Warner Cable authorizes MNN to create its own internal rules and regulations. Resp. App. 16a, § 8.1.8. It is pursuant to these internal rules—not the PSC regulations—that MNN suspended Respondents. JA-34-35, ¶¶ 109, 114; *see also Sullivan*, 526 U.S. at 52 ("Action taken by private entities with the mere approval or acquiescence of the state is not state action."); *see also Albert v. Carovano*, 851 F.2d 561, 571 (2d Cir. 1988) ("even if the state had specifically required ... Hamilton [College] to adopt the precise rules ..., the ultimate power to select a particular sanction in individual cases would, as in [*Blum*], rest with the private party").

For this reason, reliance on *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), is misplaced. In *Adickes*, the Court remanded for further fact-finding to determine whether there was a "state-enforced custom

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[9] In *Nat'l Collegiate Athletics Ass'n v. Tarkanian*, 488 U.S. 179 (1988), this Court considered (and rejected) the inverse argument: that a private entity was alleged to have exerted so much control over the public entity that the public entity's conduct was essentially compelled by the private entity. *Id.* at 198-99.

of segregating the races in public eating places" and whether a private restaurant acted under compulsion of such a custom in racially discriminating—which would constitute state action. *Id.* at 173-74. Here, by contrast, there are absolutely no allegations that MNN was acting under a state-enforced custom, law, or any other state directive. The alleged constitutional violation relates to disciplinary actions and purported viewpoint discrimination that are in no way compelled by the relevant state regulations.

The argument that lower courts have found state action where "government standards, rather than private-sector standards, dictate the result a nominally private actor must reach" fares no better. ACLU Br. at 22. The cases cited for this proposition found state action because of the *active role* of the government in the constitutionally-suspect decision. These are essentially "joint action" cases. For example, in *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263 (11th Cir. 2003), the Eleventh Circuit relied on record evidence that a state transportation agency was the entity that rejected a proposed advertisement on a public bus shelter. The private advertising company with whom it contracted to construct the bus shelter merely relayed this rejection to the aggrieved plaintiff. The court held that for purposes of summary judgment only, it was persuaded that the "private actor is merely a surrogate for the state, and the tie between them is sufficiently strong for the nexus/joint action test to be satisfied." *Id.* at 1278-79. Similarly, in *U.S. v. Stein*, 541 F.3d 130 (2d Cir. 2008), the Second Circuit found that the government was involved in creating KPMG's policy regarding the payment of attorneys' fees for indicted employees; and the govern-

ment continued to intervene in KPMG's decision-making in order to encourage witness cooperation. This amounted to "'overt' and 'significant [government] encouragement.'" *Id.* at 148.

Moreover, if Respondents were correct that MNN improperly exercised editorial discretion *in contravention of state regulation*, then MNN could not have been acting "under color of state law" in injuring Respondents. *See* CAC Br. at 4-11. Indeed, to the extent that MNN was acting "contrary to the relevant policy articulated by the State" in allegedly discriminating against Respondents, their injury "could not be ascribed to any governmental decision." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 938, 940 (1982); *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-77 (1972) (private fraternity's decision to discriminate could not be ascribed to any governmental decision because, even if the regulation by the Pennsylvania Liquor Control Board was "pervasive," that regulation "cannot be said to in any way foster or encourage racial discrimination" or "make the State in any realistic sense a partner or even joint venture in the club's enterprise").

For this reason, Respondents' and their *amici's* concern that a state actor's breach of *any* state law would undermine a constitutional claim against that state actor (*see* ACLU Br. at 25-27) is misplaced. The relevant inquiry is whether the *challenged conduct* finds its source in a state law or policy.[10]

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[10] The ACLU's example of MNN rejecting content it deems unprotected by the First Amendment is meaningfully different than what Respondents allege happened here. ACLU Br. at 25-27. MNN unquestionably *has* statutory authority not to air content that has no First Amendment protection, *see* 16 NYCRR 895.4(c)(8), and would therefore be acting "pursuant to"

IV. THE COURT CONSIDERS THE SUFFICIENCY OF THE PLEADINGS ON A 12(B)(6) MOTION TO DISMISS

Respondents have included a raft of allegations that appear nowhere in their Amended Complaint. But this Court will "not rely on ... evidence first introduced to this Court [that] 'is not in the record of the proceedings below.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990) (quoting *Adickes*, 398 U.S. at 157 n.16).[11] The issues here are whether the district court correctly granted Petitioners' motion to dismiss, *see* Pet. App. 40a-41a (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)), and whether the Second Circuit was correct in reversing that decision and determining—*on the pleadings*—that MNN and its employees are state actors.

It bears emphasizing that the district court afforded Respondents the opportunity to re-plead (after learning the basis on which Petitioners sought dismissal), cautioning that they would not be afforded another chance. JA-8-9, 51-52. Respondents had ample opportunity to plead sufficient allegations and cannot introduce new purported facts on appeal to buttress their inadequate allegations.

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the state statute. ACLU Br. at 25. Here, Respondents state that MNN took actions that are not authorized by statute.

[11] In any event, this purported history is not dispositive in determining the constitutional character of the public access channels. As this Court has observed regarding *Lebron*, it is the nature of the government's "control and supervision" that governs the nature of a forum. *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1233 (2015).

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Appendix

APPENDIX

Cable Franchise Agreement

by and between

The City of New York

and

Time Warner Entertainment Company, L.P.

***

THIS AGREEMENT (this "Agreement") is entered into by and between the City of New York ("the City"), a validly organized and existing political subdivision of the State of New York, and Time Warner Entertainment Company, L.P., a limited partnership duly organized under the applicable laws of the State of Delaware ("Franchisee").

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1.46 *Public Access Channel*: An Access Channel which Franchisee shall make available to the CAO, at no charge, as provided, and for the purposes described, in Article 8 of this Agreement.

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No. 17-1702

In the Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICI CURIAE BRIEF OF THE ALLIANCE FOR COMMUNITY MEDIA, THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY, AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The Alliance for Community Media ("ACM") is a national nonprofit membership organization representing over 3000 public, educational, and governmental ("PEG") access organizations, community media centers and PEG channel programmers throughout the nation.[2] Those PEG organizations and centers include more than 1.2 million volunteers and 250,000 community groups that provide PEG access cable television programming in local communities across the United States.

The Alliance for Communications Democracy ("ACD") is a national membership organization of nonprofit PEG organizations that supports efforts to protect the rights of the public to communicate via cable television, defends PEG access at the Federal Communication Commission ("FCC") and in the courts, and promotes the availability of the widest possible diversity of information sources and services to the public.[3] The organizations represented by ACD have helped thousands of members of the public,

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[1] Pursuant to Supreme Court Rule 37.6 *amici curiae* state that: (i) this brief was not authored in whole or in part by a party's counsel; (ii) neither a party nor a party's counsel contributed money to fund the preparation or submission of this brief; and (iii) no person, other than *amici* or their counsel, contributed money to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* state that all parties have consented to the filing of this brief.

[2] Petitioner Manhattan Community Access Corporation ("MNN") is a member of ACM.

[3] ACD's members include MNN and *amicus curiae* Chicago Access Corporation. Neither MNN nor Chicago Access Corporation participated in, or was involved in, the drafting of this brief.

educational institutions and local governments make use of PEG channels that have been established in their communities pursuant to franchise agreements and federal law, 47 U.S.C. § 531.

The National Association of Telecommunications Officers and Advisors ("NATOA") is a national nonprofit membership organization of local government representatives from across the nation whose responsibility is to develop and administer communications policy, including cable franchise agreements and PEG access, for the nation's local governments. Since its founding in 1980, NATOA has provided support for and advocated on behalf of local governments in the enactment and implementation of federal communications laws, administrative rulings, and judicial decisions impacting PEG access, and the cable franchises through which PEG channel capacity is designated.

ACM, ACD, and NATOA are participating as *amici* in support of Respondents in order to address the attempt of *amicus* NCTA—the Internet & Television Association ("NCTA") to inject a new constitutional issue here that was not raised before the courts below.

The issues before the Court are whether, or under what circumstances, private operators of cable system public access channels may be considered state actors for purposes of the state action doctrine. Pet'rs' Br. at i. Thus, at issue here are "the confines of the 'state action' doctrine." Pet'rs' Br. at 3; *See also* Resp'ts' Br. at 17-18 (summarizing Respondents' position as "Respondents have thus adequately pleaded that petitioners' challenged conduct was a state action.") (footnote omitted). Neither party, either before this Court or below, has called into

question the constitutionality of PEG access requirements. *Amicus* NCTA has nevertheless invited the Court to address "whether the requirement imposed on NCTA's members to set aside public access channels in the first place violates *their* First Amendment rights," NCTA Br. at 1. NCTA thereby has called into question the constitutionality of a federal statute that authorizes PEG requirements. 47 U.S.C. § 531.

NCTA's *amicus* brief has compelled ACM, ACD, and NATOA to file this *amicus* brief to urge the Court to reject NCTA's invitation. ACM's, ACD's, and NATOA's members, as well as local governments, PEG centers, and PEG programmers across the nation, rely on PEG requirements authorized by the federal Cable Act, 47 U.S.C. § 531, and contained in the cable television franchise agreements between franchising authorities and cable operators serving their communities. Those statutory rights, and the future of ACM's, ACD's, and NATOA's members' media operations, could be placed in severe jeopardy if the Court were to accept NCTA's arguments.

SUMMARY OF ARGUMENT

Amicus NCTA admits that "[t]he question of whether the PEG-channel requirement is itself constitutional is not directly before this Court . . . ." NCTA Br. at 3. It nevertheless requests that the Court issue an advisory opinion on the alleged burdens imposed by PEG requirements on cable operators' First Amendment rights. The Court should deny NCTA's request. This case does not present the Court with either a developed record on alleged burdens of PEG requirements on cable

operators, or adversarial legal arguments from the parties on this issue.

Prudential considerations strongly caution against consideration of NCTA's request. The Court generally does not address issues that are raised only by *amici*. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981)). It likewise does not ordinarily pass on questions of constitutional law "unless such adjudication is unavoidable." *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)) (internal quotation marks omitted). That NCTA frames its request for an advisory opinion in terms of seeking "recogni[tion]" and "acknowledge[ment]," NCTA Br. at 2, 21, makes it no less advisory and no less inappropriate.

In any event, NCTA's *dicta* request rests on faulty factual and legal arguments. It identifies not a single concrete example of any burden that a PEG requirement has imposed on any particular cable operator. NCTA also makes sweeping, generalized assertions about the current media landscape in an attempt to support its claim that PEG requirements serve no government interest. But NCTA assumes that all Americans have equal access to online and other sources of video programming as they do to cable television. They do not. Whereas virtually all of the population has access to cable television, more than 24 million Americans lack access to fixed terrestrial broadband internet. *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, WC Docket No. 17-199, 2018 Broadband Deployment Report, 33 FCC Rcd 1660,

1681, para. 50 (2018). NCTA likewise ignores the dominant and unique position of traditional cable television relative to other sources of video programming.

NCTA analogizes PEG channels to various internet-based and other sources of video programming, but the analogy does not disprove that PEG access serves a substantial, even compelling, government interest. PEG access centers are intrinsically connected to their local communities. PEG channels provide a platform for those seeking to share their stories, and they host content that commercial media—whether on cable or online—ignores. PEG access centers also provide coverage of local government bodies and hyper-local issues that cannot be found elsewhere.

PEG requirements thus advance the government interest in promoting localism and assuring that cable systems are responsive to local needs and interests. NCTA's emphasis on online and other sources of video programming is misplaced, because neither Congress nor the courts have justified PEG requirements solely on the basis of cable operators' bottleneck control over video programming distribution. NCTA's reliance on court decisions involving *other* Cable Act requirements is likewise misplaced. Unlike PEG requirements, those other Cable Act requirements were designed to address government interests relating to the amelioration of cable operator market power, and thus are forms of structural economic regulation designed to address the issue of cable operators' bottleneck control. Because PEG requirements serve other government interests, whether cable operators still possess bottleneck control is irrelevant to the constitutionality of those requirements.

Finally, PEG access requirements are content-neutral and survive intermediate scrutiny. The Cable Act only authorizes franchising authorities to require that channel capacity be set aside for PEG access; it does not require it. The actual requirements imposed by franchising authorities vary depending on individual local community cable-related needs and interests, and to succeed in its facial challenge to PEG requirements, NCTA would have to show that no PEG requirement could be imposed in a constitutionally valid manner. It has not, and cannot do so.

ARGUMENT

I. THE COURT SHOULD REJECT *AMICUS* NCTA'S REQUEST TO ADDRESS A CONSTITUTIONAL ISSUE OUTSIDE THE CASE AND CONTROVERSY BEFORE THE COURT.

NCTA's brief is principally devoted to arguing that Congress's authorization of PEG requirements burdens cable operators' First Amendment rights and that "the dramatic changes in the marketplace make it far more difficult today to justify the burden imposed by [the PEG-channel] requirement." NCTA Br. at 4; *see also id.* at 9-17. Although NCTA requests that the Court "not *decid[e]* that this [PEG] requirement is constitutional," it does ask the Court to "*recognize* in its opinion that the First Amendment rights of cable operators are burdened by the requirement that cable operators set aside public

access channels." *Id.* at 2 (emphasis added).[4] The Court should decline NCTA's request.

NCTA's argument is unhinged from the facts and legal issues raised by the parties in this case. It is instead based on unsupported assertions about supposed burdens on cable operators, sweeping generalizations about the current media landscape, and cases that address other Cable Act requirements imposed on cable operators that serve different government interests. *Amici* ACM, ACD, and NATOA respond to these allegations below. But in any event, the Court should follow its normal course of practice and decline NCTA's invitation to address issues of constitutional law unrelated to, and unnecessary to resolving, this case.

NCTA concedes that neither Petitioners nor Respondents have raised any issues regarding cable operators' First Amendment rights and that this issue is not before the Court. *Id.* at 1, 3. As a result, no factual record exists in this case concerning the supposed burdens that PEG requirements might impose on cable operators. In fact, the Court has been presented with no information about any burdens that PEG requirements impose on the cable

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[4] In parts of its brief, NCTA frames the issue as "the requirement imposed on NCTA's members to set aside *public access channels*," NCTA Br. at 1 (emphasis added), but elsewhere it refers more broadly to "PEG-channel requirements," *Id.* at 3. NCTA's arguments and request that the Court "recognize" the burdens imposed by these channels are misplaced, regardless of whether referring to only public access channels or to PEG access channels. But the fact that NCTA uses these terms interchangeably and glosses over distinctions among public, educational, and governmental access further highlights why the Court should not weigh in on this issue, which has had no record development in this case.

operators on whose systems MNN's public access channels are carried. When the D.C. Circuit previously rejected a facial challenge to the Cable Act's PEG provisions, the cable operator had "provided affidavits describing the impact, in terms of both finances and substantive programming, that the PEG requirements have had on cable operators around the country." *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 972 (1996), *aff'd in part and rev'd in part sub nom. Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000) ("*Time Warner Entertainment*"). Here, the Court has no such evidence, from either the parties or *amicus* NCTA.

Likewise, the Court does not have the benefit of adversarial legal arguments from the parties on this issue. This issue was not even raised, much less litigated below, and neither decision below addressed the question now raised by NCTA. Indeed, NCTA's First Amendment challenge falls outside the Article III case and controversy before the Court. NCTA asks this Court to address the constitutionality of an act of Congress without the benefit of the views of the United States or the affected—or indeed, any—franchising authority. Fundamentally, the alleged injury to NCTA's members is not traceable to MNN's alleged conduct at issue here, nor would it be remedied by a resolution of the actual controversy before the Court.[5]

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[5] NCTA asserts that "however this Court resolves those questions [actually presented by the parties], it is likely to exacerbate the already substantial harm to cable operators' protected speech interests." NCTA Br. at 20. But NCTA provides no reasoned explanation as to why that might be so. The Court's decision resolving the questions presented would not reach or affect either the continued existence of PEG requirements or the Cable Act provision authorizing

Prudential considerations likewise caution against consideration of a First Amendment issue not even raised, much less developed, by the parties in this case.

The Court "do[es] not ordinarily address issues raised only by *amici*." *Kamen*, 500 U.S. at 96 n.4 (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981)). Yet that is what NCTA seeks to do here. It "takes no position on the actual questions presented by the parties," NCTA Br. at 20, but instead invites the Court to opine on the First Amendment rights of cable operators. NCTA's request that the Court address a *constitutional* issue that has not been raised by the parties is particularly inappropriate. The Court has explained that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Clinton*, 520 U.S. at 690 n.11 (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)) (internal quotation marks omitted). That is the case here. The First Amendment issue raised by NCTA is clearly avoidable. The issue is not among the questions presented, neither Petitioners nor Respondents argue that this issue must be addressed, and the issue was not raised, much less addressed, by the courts below.

In essence, NCTA seeks an advisory ruling on a question of constitutional law that, although not

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franchising authorities to set aside channel capacity for PEG use, 47 U.S.C. § 531. NCTA has not shown that the alleged burdens of PEG requirements on cable operators' First Amendment rights would change in any way as a result of the Court's decision on the questions presented.

raised by the parties in this case, is of particular interest to NCTA's members. NCTA attempts to circumvent long-established principles against such advisory opinions by framing its request as seeking only that the Court "recognize" or "acknowledge" that the First Amendment rights of cable operators are burdened by PEG channel requirements. NCTA Br. 2, 3, 21. But whether or not PEG requirements place any cognizable burden on cable operators is simply not before the Court, nor was it before the courts below. That NCTA stops short of requesting that the Court hold that federal authorization of PEG requirements violates cable operators' First Amendment rights does not make its request for *dicta* any less advisory and therefore any less inappropriate.

Moreover, it is particularly inappropriate for the Court to make any generalized statements about the alleged burdens of PEG requirements because the PEG requirements that cable operators are subject to vary. *See* Resp'ts' Br. at 30-31 (discussing the significant differences among various state and local PEG requirements). The D.C. Circuit has previously explained that it is particularly "tricky" to evaluate a facial challenge of PEG requirements, because "rather than *requiring* PEG channel capacity, the statute merely *permits* local franchise authorities to require PEG programming as a franchise condition." *Time Warner Entertainment* at 972. While the D.C. Circuit could "imagine PEG franchise conditions that would raise serious constitutional issues," it explained that "we can just as easily imagine a franchise authority exercising its power without violating the First Amendment." *Id.* at 973. In contrast, NCTA asks the Court to issue an opinion that makes sweeping generalizations about

the alleged burdens imposed by all PEG requirements. Such a request, particularly coming from an *amicus* on an issue not necessary to resolve the issues in the case, should be declined.

Even if the Court were intrigued by the issue raised by NCTA, it should wait for an actual case or controversy that properly presents the issue. Until then, the issue of alleged burdens of PEG requirements on cable operators' First Amendment rights "remain[s] unfocused because [it is] not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

II. EVEN IF THE COURT WERE TO ADDRESS THE ISSUE, NCTA'S ATTACK ON THE CONSTITUTIONALITY OF PEG-CHANNEL REQUIREMENTS IS MISGUIDED.

For the reasons set forth above, the Court should not address issues relating to the First Amendment rights of cable operators in this case. But as Respondents note, PEG requirements do not infringe upon the rights of cable operators. Resp'ts' Br. at 42-43. Were the Court to address the issues raised by *amicus* NCTA, it should reject the argument that First Amendment rights of cable operators are burdened by PEG requirements.

A. NCTA's claims about the supposed burdens that PEG requirements place on cable operators are unsupported and misplaced.

NCTA's request that the Court address the alleged burden PEG requirements impose on cable operators' First Amendment rights is based on sweeping assertions about cable operators and PEG access that have little to no support, let alone the kind of support that could result from a developed and contested record.

1. In terms of the alleged burden on cable operators' speech, NCTA asserts that there is a "significant risk that cable subscribers . . . will incorrectly attribute the speech [carried on PEG channels] to cable operators, assuming that the cable operators have *chosen* to transmit the programming that appears on those channels." NCTA Br. at 9-10. NCTA asserts that "examples abound," but provides descriptions of just two instances where unnamed cable operators in unnamed communities carried certain programming that NCTA vaguely describes. *Id.* at 10 n.3. Even in those two vague examples, NCTA does not claim that even so much as a single viewer misattributed the speech in question to the cable operator.

NCTA also claims that cable operators "often must respond to customer complaints regarding programming that is transmitted on PEG channels." *Id.* But again, NCTA provides no examples of such complaints, nor does it provide any information on the extent to which cable operators receive complaints regarding programming transmitted on other, non-PEG channels. The two vague examples NCTA mentions do not include any claim that any

viewers contacted the cable operator about the programming at issue.

Despite the lack of any evidence that viewers misattribute the content of PEG channels to cable operators, NCTA attempts to analogize to the situation in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986). In that case, the Court invalidated a requirement that an electric utility must allow particular groups to use space in billing envelopes to ratepayers to discuss any issues they choose. In concluding that this requirement violated the First Amendment, the Court emphasized that the utility "will feel compelled to respond" to the third-party speech in the billing envelopes. *Id.* at 16. Third-party use of confined mail envelope space in a utility bill is not at all similar to setting aside channel capacity on cable systems for PEG access. With the multitude—typically hundreds—of channels available on a cable system, there is not the same concern with forced association of cable operators with speech on PEG channels as there is for a utility company with speech in the confined space of a billing envelope.

NCTA relegates to a footnote the far more analogous situation in *Turner*, where the Court rejected the argument that viewers would attribute speech carried on broadcast stations to the cable operator. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655-56 (1994) ("*Turner*"). NCTA offers no support or explanation for its assertion that "there is a less clear demarcation between the programming that runs on PEG channels and the programming that runs on channels managed by the cable operator." NCTA Br. at 10 n.4. The only aspect of the Court's discussion of broadcast channels in *Turner* that would not apply to PEG channels is the federal

regulation requiring broadcasters to identify themselves at least once every hour. 47 C.F.R. § 73.1201. But in practice, PEG channels (as do almost all other cable programming channels that operators carry on their systems) also regularly identify themselves, and there is nothing before the Court in this case remotely suggesting that viewers are likely to be confused as to which channels are PEG access channels and which channels are voluntarily carried by the cable operator. (In fact, there is nothing in the record indicating that a cable operator "manages" the content of any unaffiliated video programming channel that it chooses to carry.)

2. NCTA goes on to assert that today's media landscape "renders untenable the claim that the PEG-channel requirement is necessary to serve a governmental interest." NCTA Br. at 17; *see also* Br. of Pacific Legal Foundation and TechFreedom ("PLF Br.") at 22-23. While the media landscape has undergone significant changes in the past decades, it does not follow that PEG access no longer serves a substantial, even compelling, governmental interest. In fact, PEG access continues to play a vital and irreplaceable role, contrary to the one-sided picture painted by NCTA.

NCTA repeatedly stresses that the rise of online sources of video content renders PEG access unnecessary. NCTA Br. at 13-17. It notes, for instance, that New York City posts videos of local government meetings online, and then claims that "[a]s that example illustrates, local governments, educations institutions, and individuals can (and do) now easily provide content to interested citizens in ways that are far more user-friendly than a PEG channel." *Id.* at 17. But just because the largest city

in the country[6] makes videos of governmental meetings available online does not mean that *all* local governments, educational institutions, and individuals therefore can easily do so. Furthermore, NCTA provides no explanation for its claim that New York City's online platform is "far more user-friendly than a PEG channel," *id.*, especially when 26 percent of New York City households lack broadband internet at home and 16 percent lack even a computer at home. New York City Comptroller, *Internet Inequality: Broadband Access in NYC Update—September 2015* (Sept. 22, 2015), https://comptroller.nyc.gov/reports/internet-inequality-broadband-access-in-nyc-update-september-2015/.

NCTA's argument also ignores the millions of Americans who lack access to broadband internet or do not use the internet because of the cost of doing so or other reasons. According to the Federal Communications Commission's ("FCC") 2018 Broadband Deployment Report, "over 24 million Americans still lack fixed terrestrial broadband speeds of 25 Mbps [download speed]/3 Mbps [upload speed]." 2018 Broadband Deployment Report, 33 FCC Rcd at 1681, para. 50.[7] This lack of access is more pronounced in rural areas and Tribal lands,

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[6] U.S. Census Bureau, *Annual Estimated of the Resident Population for Incorporated Places of 50,000 or More* (May 2018), https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2017/PEPANNRSIP.US12A.

[7] Although the FCC found that over 99 percent of American's have access to mobile broadband with minimum advertised speeds of 5 Mbps download/1 Mbps upload, it rejected the argument that mobile services are a full substitute for fixed terrestrial services. *Id.* at 1666, para. 17.

where the percentages of people lacking access to fixed broadband is 30.7 percent and 35.4 percent, respectively. *Id.* at 1681, para. 50. The FCC's report also shows significant differences in broadband access based on income, with counties in the lowest quartile of median household income having just 56.2 percent of the population with access to both fixed and mobile broadband compared to 83.6 percent in the highest quartile. *Id.* at 1692, para. 62.

3. Apart from the issue of access, NCTA's sweeping assertions overlook that many more Americans view video programming via cable television than over the internet, and that far more Americans rely on traditional television, not the internet, for news. Recent research shows that "[a]mong the roughly half of U.S. adults who prefer to watch their news, the vast majority—75%—prefer the television as a mode for watching; 20% of watchers prefer the web." Amy Mitchell, Pew Research Ctr., *Americans Still Prefer Watching to Reading the News—And Mostly Still Through Television* (Dec. 3, 2018), http://www.journalism.org/2018/12/03/americans-still-prefer-watching-to-reading-the-news-and-mostly-still-through-television/.

Moreover, many Americans do not use the internet and thus cannot access the online sources of video content emphasized by NCTA. The Pew Research Center estimates that 11 percent of U.S. adults do not use the internet, and that jumps to over one third for both Americans 65 and older and Americans with less than a high school level of education. Monica Anderson, et al., Pew Research Ctr., *11% of Americans Don't Use the Internet. Who Are They?* (Mar. 5, 2018), http://www.pewresearch.org/fact-

tank/2018/03/05/some-americans-dont-use-the-internet-who-are-they/. And while "whites, blacks, and Hispanics are all equally likely to be offline," *id.*, there are significant racial disparities in terms of having a broadband connection at home. Andrew Perrin, Pew Research Ctr., *Smartphones Help Blacks, Hispanics Bridge Some—But Not All—Digital Gaps with Whites* (Aug. 31, 2017), http://www.pewresearch.org/fact-tank/2017/08/31/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/ (78 percent of whites report having a broadband connection at home, compared to 65 percent black respondents and 65 percent of Hispanic respondents).

In contrast, cable television service is both more widely available and viewed than online video. The FCC's most recent report on the Status of Competition in the Market for Delivery of Video Programming "assume[s] that cable [multichannel video programming distributors ("MVPDs")] are available to *over 99 percent* of housing units." *Annual Assessment of the Status of Completion in the Market for the Delivery of Video Programming*, WC Docket No. 16-247, Eighteenth Report, 32 FCC Rcd 568, 575, para. 20 (2017) (emphasis added).[8] The Nielsen Total Audience Report for the second quarter of 2018 notes that the average time per adult eighteen and over spent watching live and time-shifted television was four hours and twenty minutes, compared to just one hour and four minutes of all other video sources. The

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[8] The report explains that previous data showed that cable MVPDs provide video service to 99.7 percent of housing units, but data on estimates for the number of housing units passed is no longer tracked. *Id.* at 8 n.33.

Nielson Co., *The Nielson Total Audience Report Q2 2018*, at 4 (2018), https://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2018-reports/q2-2018-total-audience-report.pdf ("Nielsen Report").[9] And traditional cable is the dominant way in which Americans access television. The same Leichtman Research Group press release cited by NCTA (at 13 n.5) shows that six largest cable companies have more total video subscribers than the top satellite TV providers, top telephone companies, and top internet-delivered pay-TV providers combined. Press Release, Leichtman Research Group, Inc., *Major Pay-TV Providers Lost About 975,000 Subscribers in 3Q 2018* (Nov. 13, 2018), https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-975000-subscribers-in-3q-2018/.

After traditional cable, satellite providers have the next most pay-TV subscribers. *Id.* But although satellite providers are not subject to PEG requirements, they are subject to various public interest requirements. 47 C.F.R. § 25.701(b)-(d) (political related public interest requirements), § 25.701(e) (commercial limits in children's programming), § 25.701(f) (carriage obligations for noncommercial programming of educational or informational nature). NCTA makes no mention of these access requirements on satellite providers, but they refute its claim that "cable operators, alone among all of these providers of video programming

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[9] The other sources are: (1) "Video Focused App/Web on a Table" (five minutes); (2) "Video Focused App/Web on a Smartphone" (ten minutes); (3) "Video on a Computer" (five minutes); and (4) "TV-Connected Devices (*DVD, Game Console, Internet Connected Device*)" (forty-four minutes). *Id.*

services, are uniquely subject to onerous carriage obligations." NCTA Br. at 16.

NCTA also claims that "'virtual' MVPDs now compete with cable operators to provide full-fledged channel line-ups," *id.* at 14. But less than 3.5 percent of television households access cable content through a virtual MVPD. Nielson Report at 16. And only 6.3 percent of households access such content exclusively through a broadband internet connection. *Id.* In short, NCTA ignores the unique importance of cable television as a means of reaching large audiences and grossly overstates online and other non-cable sources of video programming as a substitute to reach such audiences.

4. NCTA's argument that (some) people can access "video content" through a variety of internet-based and other sources wrongly assumes that the availability of *any* video content through non-cable service sources automatically eliminates any government interest in PEG access. It does not. Many of the examples of online applications given by NCTA, such as Netflix, Hulu, and Amazon Prime Video, do not allow the public, educational institutions, or governmental bodies to provide programming over their platforms. So, although these platforms may have name recognition, they provide no support at all for NCTA's assertion that "those speakers could reach that audience in numerous ways other than through a public access channel." NCTA Br. at 17 (footnote omitted).

The subset of online video applications that does allow users to upload video content is fundamentally different from PEG access.[10] Unlike

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[10] The only example of such an online application cited by NCTA is YouTube.

online platforms such as YouTube, PEG access centers provide more than just a means of making video content available to the world at large. "PEG channels reflect the special interests and character of each local community." Steven Waldman et al., FCC, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* 171 (2011), https://www.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf. They provide a unique outlet for small, underserved, and unserved segments of the community, such as non-English-language speakers, to connect and share their voices. PEG channels are also an outlet for nonprofit organizations to reach those in need of assistance and build community relationships. Moreover, PEG access centers do more than provide a platform for speech; many support those in their communities through media production and literacy training. *Id.*

PEG channels' fundamental connections with their local communities also position them as unique platforms for local civic and political issues. They cover local elections often overlooked by larger, and even local, commercial media sources, and they also engage in issues affecting communities outside of major media markets.[11] Although some major cities

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[11] *See* Joint Petition to Deny of the Alliance for Community Media and the Alliance for Communications Democracy, Appendix 2, *Application of Charter Comm'ns, Inc., Time Warner Cable Inc. & Advance/Newhouse P'ship for Consent to the Transfer of Control of FCC Licenses & Authorizations*, MB Docket No. 15-149 (filed Oct. 13, 2015), http://apps.fcc.gov/ecfs/comment/view?id=60001303513 (detailing ACM's fall 2012 survey of over 200 of its member PEG centers' 2012 election coverage and programming, which shows that 85 percent of respondents produced and/or aired

such as New York put videos of government meetings online, others rely on PEG channels to deliver local government transparency to residents. And many of the videos of local government meetings that are available online are produced by PEG access centers.

5. By mischaracterizing the current media landscape and the relationship between PEG access and cable systems, NCTA overlooks the benefits of PEG access channels and the various substantial, indeed compelling, government interests they serve. It instead suggests that the government's *only* interest in PEG access is to address cable operators' bottleneck control over video programming. NCTA Br. at 12; *see also* PLF Br. at 22-23. NCTA's argument relies on two opinions that emphasize the issue of bottleneck control of cable operators: *Turner*, and then-Judge Kavanaugh's dissenting opinion in *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1322 (D.C. Cir. 2010) ("*Cablevision*"). Neither of these opinions, however, discusses PEG requirements or stands for the proposition that the only governmental interest served by PEG access is ameliorating cable operators' bottleneck market power.[12]

2012 election programming and, of those that reported covering the election, 95 percent covered local elections).

[12] NCTA also cites to the district court decision in *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 6 (D.D.C. 1993), *aff'd in part sub nom. Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *aff'd in part and rev'd in part sub nom. Time Warner Entm't Co., L.P. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000). But the language NCTA quotes pertains to *both* "PEG and leased access provisions" of the Cable Act. *Id.* The court upheld the validity of the PEG requirements, and it

Turner, and its discussion of the bottleneck rationale in particular, addressed the constitutionality of the Cable Act's broadcast station must-carry provisions. The Court summarized Congress's reasoning behind the must-carry provisions:

> In brief, Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance.

Turner at 632-33.

In *Cablevision*, the D.C. Circuit addressed the FCC's decision to extend the Cable Television Consumer Protection and Competition Act of 1992's prohibition on exclusive programming contracts between a cable operator and cable-affiliated programming networks. Then-Judge Kavanaugh's dissenting opinion noted that this prohibition "arose out of a simple congressional concern. Cable programming networks that were vertically integrated with bottleneck monopoly cable operators might 'simply refuse to sell to potential competitors'

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did not address whether any additional government interests further supported their validity.

in the video programming distribution market, such as emerging 'cable operators, satellite dish owners, and wireless cable operators.'" *Cablevision* at 1320 (quoting S. Rep. No. 102-92, at 26 (1991) *reprinted in* 1992 U.S.C.C.A.N. 1133, 1189).

Thus, the sole government interest at issue in the *Turner* and *Cablevision* opinions related to federal economic structural regulation of the cable industry justified by concerns over market power arising from cable operators' bottleneck control over video programming distribution. PEG requirements, on the other hand, are not intended to ameliorate cable operators' market power. The legislative history of the Cable Act notes several ways in which PEG access advances the public interest, but none of them relates to competition or ameliorating market power:

> Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.

H.R. Rep. No. 98-934, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667.

The Cable Act also states that one of its purposes is to "establish franchise procedures and standards . . . which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). This government interest in localism is advanced by PEG access and is independent from the issue of cable operators' bottleneck control over video programming.

6. PEG access requirements, which are set forth in local franchise agreements, are obligations imposed on cable operators in return for their use of the public's rights-of-way to install and operate their systems. They are thus consideration for use of the public's property, not structural economic regulation unrelated to use of public property, as must-carry requirements are. In exchange for permitting a cable operator to install and operate its private commercial facilities in the public rights-of-way, the local franchising authority may reasonably require that the cable operator set aside PEG capacity on the system for the public's use, rather than just the operator's private use. *See* Resp'ts' Br. at 32-43. Subject to the federal law requirement that such channel capacity "be designated for public, educational, or governmental use," 47 U.S.C. § 531(b), the public, through the franchising authority, is entitled to use of a modest portion of cable system capacity that would not exist but for the public property that the cable operator uses to build and operate its system. Whatever First Amendment rights cable operators have regarding their cable systems as a whole do not absolve them of the obligation to provide a public benefit in return for their use of the public's property, nor do they entitle them to demand that public property be transformed into cable operators' own private speech preserve.

Thus, neither Congress nor the courts have justified PEG requirements solely on the basis of the continuing existence of cable operator's bottleneck control. There are, at minimum, serious questions about the accuracy and reliability of NCTA's factual assertions that cable operators no longer possess bottleneck control. But even assuming that cable operators do lack bottleneck control, NCTA is simply wrong in contending that PEG access serves no government interest.

B. NCTA cannot make a facial claim against PEG access requirements.

The Cable Act was enacted "[t]o assure a cable system provides programming that is responsive to the needs of the local community." *Time Warner Cable v. City of New York*, 943 F. Supp. 1357, 1367 (S.D.N.Y. 1996), *aff'd sub nom. Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997) ("*Time Warner Cable*"). The Act does not require that cable operators carry PEG channels; rather, it authorizes franchising authorities to require PEG channels be set aside as a condition of granting a franchising license. *Id.* Not only does the cable operator get a franchise license in exchange for setting aside PEG channel capacity; it gets to use public rights-of-way and easements for the cable operator's requisite wires to reach its viewers. *Time Warner Entertainment* at 973.[13]

1. Seeking to invalidate all PEG requirements, NCTA asserts that PEG requirements are content-

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[13] Unlike broadcast television, cable requires a physical presence, with wires installed underground and on poles. *Time Warner Cable* at 1367.

based *on their face*. NCTA Br. At 3 ("Moreover, the PEG-channel requirement is facially content-based."). But to succeed in a facial challenge of PEG requirements, NCTA would have to "show that no franchise authority could ever exercise the statute's grant of authority in a constitutional manner." *Time Warner Entertainment* at 973. This NCTA does not, and cannot, do. A PEG franchise condition that requires a channel devoted to broad, nondiscriminatory public use is content-neutral under *Turner*. *Time Warner Entertainment* at 973. Likewise, requirements for educational or governmental use of channel capacity can be exercised in an expansive, content-neutral manner so as to survive a facial First Amendment challenge. The Court's reasoning in *Turner* for rejecting the argument that the Cable Act's must-carry regulations are content based equally applies to PEG requirements:

> [The challenged provisions] do not require or prohibit the carriage of particular ideas or points of view. They do not penalize cable operators or programmers because of the content of their programming. They do not compel cable operators to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements.

Turner at 647. Because NCTA has not shown, and cannot show, that there are no conceivable PEG channel franchise requirements that are content-neutral, its facial challenge to PEG channel requirements as content-based regulations would fail, even if it were properly before the Court (which it is not).

2. In another attempt to apply the strict scrutiny standard of a content-based regulation to PEG channel requirements, NCTA claims that cable operators have the same First Amendment rights "afforded to traditional members of the print media who both produce their own content and exercise editorial discretion." NCTA Br. at 5 (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). But this Court and Congress have long declined to extend the same level of First Amendment protection to cable television as they do to newspapers and other print media; that is because cable televisions "partakes of [only] *some* of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." *Los Angeles v. Preferred Comm'ns, Inc.*, 476 U.S. 488, 494-95 (1986) (emphasis added). Cable television has unique characteristics that subject it to special regulation.[14] Unlike cable operators, newspapers do not install and operate their printing presses on public property. *See id.* at 493-95. "[Cable systems] are unusually involved with government, for they depend upon government permission and

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[14] NCTA attempts to argue that these characteristics have been changed by digital media. As discussed above, the changes in the media landscape has not been shown to warrant a change in the treatment of cable television.

government facilities (streets, rights-of-way) to string the cable necessary for their services." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996). Newspapers do not hold their local subscribers captive, as readers can access multiple papers from different cities and different states. *Turner* at 656. Cable subscribers are captive to the content their local cable operator chooses to transmit due to the control that operators hold over the "physical connection between the television set and the cable network." *Id.*[15] These and other distinctions render NCTA's simplistic analogy of cable operators to newspapers inapt, especially so on this undeveloped record.

C. PEG access requirements further substantial government interests and impose at most a tailored, incidental restriction on cable operators' First Amendment freedoms.

A content neutral regulation, such as a PEG channel requirement, survives intermediate scrutiny if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged [First

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[15] This is to be distinguished from the bottleneck control issue discussed above. Whether or not a cable operator has bottleneck control over all means of access to video programming in a market, it does inherently own and control the wires from the operator's headend into the home over which video programming is delivered. A newspaper neither owns nor controls the streets that its delivery trucks use to deliver newspapers to the homes of its subscribers.

Amendment] freedoms is no greater than is essential to the furtherance of that interest." *Turner* at 662.[16]

PEG channel requirements unquestionably serve "important or substantial governmental interest[s] . . . unrelated to the suppression of free expression." *Id.* PEG programming advances the Cable Act's goal of "assur[ing] that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). It also serves the Cable Act's goal of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), which is "consistent with the First Amendment's goal of a robust marketplace of ideas." *Time Warner Cable* at 1368. "Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner* at 663. PEG channel requirements help ensure that access to electronic media is not monopolized by "the licensees or owners of those media" as has traditionally happened. *Time Warner Cable* at 1369.

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[16] As noted above, PEG access requirements are obligations in local franchise agreements accepted by cable operators as consideration for use of the public's property. As such, it is not clear that they burden cable operators' First Amendment rights to the extent of the federally-mandated must-carry obligations upheld in *Turner*. Thus, while PEG requirements would withstand intermediate scrutiny, as shown below, a fully developed record and adversarial legal arguments may well indicate that level of scrutiny is unwarranted where cable operators have granted access to a small portion of the cable system in exchange for the valuable benefit of using public property over which they do not have an independent right of access.

NCTA asserts that these vital governmental interests no longer matter because consumers can access video content through non-traditional, internet sources. As noted above, NCTA's assertions are both misguided and unsupported. Thus, even if the Court were to address NCTA's arguments (which it should not), it should reject them.

CONCLUSION

Amici ACM, ACD, and NATOA respectfully request that the Court decline *amicus* NCTA's invitation to address any issues regarding the First Amendment rights of cable operators. If the Court were to address such issues, however, it should reject NCTA's argument that the First Amendment rights of cable operators are burdened by PEG requirements.

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No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, ET AL.,

Petitioners,

—v.—

DEEDEE HALLECK, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND NATIONAL COALITION AGAINST CENSORSHIP, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 2 million members and supporters dedicated to defending the principles of liberty and equality embodied in the Constitution. The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the ACLU with approximately 120,000 members in New York State.

The ACLU and NYCLU are steadfast defenders of First Amendment freedoms. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases protecting the freedom of speech, including *Whitney v. California*, 274 U.S. 357 (1927); *Hague v. CIO*, 307 U.S. 496 (1939); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *New York Times v. Sullivan*, 376 U.S. 254 (1964); and *New York Times v. United States*, 403 U.S. 713 (1971). The ACLU also served as counsel for Petitioners in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

Because this case requires the Court to distinguish between private action, which is protected by the First Amendment, and state action, which is constrained by the First Amendment, its proper resolution is a matter of significant concern to

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

the ACLU, NYCLU, and their members. Public access channels in New York City were created and are maintained to provide expressive opportunities for a diversity of voices and viewpoints; New York's commitment to ideological diversity is therefore additionally implicated in this case. The ACLU and NYCLU support that commitment and for that reason, as well, the resolution of this case is of concern to amici and their members.

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, students, readers, and the general public. NCAC has a longstanding interest in opposing viewpoint-based censorship and is joining in this brief to urge the Court to preserve First Amendment protections where states dictate content decisions on public access channels. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents argue principally that Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network ("MNN") is a state actor because it performs a public function. This brief argues that MNN's broadcast content decisions constitute state action whether or not MNN is performing a public function. Those decisions are

properly attributable to the state, not any private decision-maker, because federal, state, and city laws and policies so strictly circumscribe MNN's content decisions that all independent editorial judgment is displaced. Thus, it is the state, not MNN, that is responsible for MNN's content decisions.

With rare exceptions, the Constitution is designed to regulate public actors, not private individuals. This fact requires the Court to pay careful attention to who is responsible when nominally private actors engage in conduct in coordination with or on behalf of government actors. The essential inquiry asks whether given conduct is properly attributable to a private party, and so free of constitutional constraint, or to the state, and therefore bound by the Constitution's requirements. Just as it would be inappropriate to impose constitutional constraints on truly private decision-making, so it is wrong to allow the government to evade constitutional limits by delegating its power to private parties while retaining control.

Over the course of the last century, governments at all levels have turned to private entities to carry out governmental work. *See, e.g.*, Paul C. Light, *The True Size of Government: Tracking Washington's Blended Workforce, 1984-2015*, The Volcker Alliance 3–4 (2017), https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf. In the last two decades, this has grown increasingly true at the federal level, *id.*, and "service contracting is now mainstream, championed by leading officials across the political spectrum." Jon D. Michaels, *Privatization's Progeny*, 101 Geo. L.J.

1023, 1025 (2013) (footnotes omitted). The widespread shift of federal and state government work to private organizations "is now ubiquitous in military combat, municipal policing, rule promulgation, environmental policymaking, prison administration, and public-benefits determinations," among others. *Id.*; *see also, e.g.*, *Government by Contract: Outsourcing and American Democracy* (Jody Freeman & Martha Minow eds., 2009).

The Constitution generally allows governments to delegate their operations to private actors, and to determine the parameters of those delegations. In some circumstances, such delegation results in the private entity engaging in state action. This includes situations in which the government essentially controls the details of the nominally private actor's work. "If the Fourteenth Amendment [and other constitutional rights are] not to be displaced," such delegations ought not afford the government a haven to bypass its constitutional obligations. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

There is no one state action test under existing doctrine—nor, contrary to Petitioners' position, are there simply five. Rather, the crux of the question, in its various formulations, is whether the actions of an entity can be fairly attributed to the state.

Here, the answer is yes, because federal, state, and city laws and policies combine to leave no meaningful discretion to MNN, a nominally private entity, over the decision at issue. The public access channel MNN operates is, moreover, wholly a creation of the state, and is, in all meaningful senses here, property in which the government retains a

proprietary interest. New York City negotiated with its cable operator to preserve a proprietary interest in the public access channel, and subsequently designated MNN as its agent to administer the channel for it. Access to the channel remains free to the public by law, further illustrating the channel's essentially public character. MNN is thus not only subject to regulations that divest it of any independent editorial discretion; it is charged with carrying out, without discretion, New York's plan for the provision of a government service, free of charge, over a public easement.

The combination of federal, state, and city laws and policies that governs MNN compelled the creation of the public access channel, selected MNN to run it, and established the rules for what content MNN must broadcast (all First Amendment protected content) and how it must schedule programming (on a first come, first served basis). This delegation of authority to run a government service on property in which the government retains a proprietary interest removes any private judgment from MNN's content decisions. It leaves MNN with only the task of implementing the government-mandated "first-come, first-served" rule for any First Amendment protected content. Accordingly, MNN's content decisions are properly attributable to the state, not to independent private judgment—because in its content decisions, MNN literally has no authority to exercise independent private judgment.

The fact that MNN may have misapplied the "first-come, first-served" rule that by law governs its content decision-making does not alter the result. If MNN had turned Respondents away on the ground

that it deemed their speech unprotected, Respondents would have a First Amendment claim, even if MNN misapplied the rule. The same holds true here. Because the state has essentially occupied the field and left no discretion to MNN in carrying out the government's terms with respect to any content decision, MNN's every content decision is attributable to the state.

Holding that MNN is a state actor for the limited purpose of its content decisions will have little, if any, bearing on the work of public access channel operators in other places, which function under distinct statutory regimes. Governments easily can—and do—choose to set up their public access channels in ways that do not make the organizations running them state actors. Had New York chosen to give MNN broad editorial discretion to adopt, for example, "programming in the public interest," to profile issues of local concern, or to cater specifically to children—as other states and localities have chosen to do—MNN's decision to refuse to broadcast particular content might not constitute state action. The overwhelming majority of states do not require their channel operators to broadcast all content protected by the First Amendment on a first-come, first-served basis.

Resolving this case on the grounds asserted here will also have no implications for social media platforms and other private media outlets. The parade of horribles invoked by Petitioners and some amici, including the Chicago Access Corporation ("CAC"), the Electronic Frontier Foundation ("EFF"), and the Cato Institute ("Cato"), is unfounded. A private entity's voluntary choice to accept content

indiscriminately has no First Amendment or state action implications precisely because it is the private entity's choice, not the state's regulation, that determines the ultimate decision. But MNN did not "choose" to adopt a "first-come, first-served" content rule; that rule was imposed upon it by New York as a condition of operating the public access channel. To find state action where the state itself eliminates private discretion over the administration of a government service on property in which the government retains a proprietary interest has no implications for private entities that choose, of their own free will, to operate platforms on a first-come, first-served, or any other, basis.

STATUTORY AND REGULATORY BACKGROUND

Respondents DeeDee Halleck and Jesus Papoleto Melendez challenge MNN's decision to ban the broadcast of their video and the subsequent consequences of that ban, including Respondents' suspensions from broadcasting other content on MNN. As set forth below, MNN's decision about whether to broadcast particular content is entirely governed by a combination of federal, state, and city laws, the requirements of which are also reflected in a contract between MNN, a public access channel operator, and Time Warner, a cable operator, pursuant to requirements imposed by the City.

1. Federal Law

For a cable operator to reach subscribers in a particular region, it must obtain a franchise from the local government. Federal law—specifically, the Cable Communications Policy Act of 1984 (the "1984

Cable Act")—allows local governments to require, as part of any such franchise, that the cable operator designate channel capacity for public, educational, or government ("PEG" or "public access") use. 47 U.S.C. § 531(b). If a local government chooses to require public access channels, as most do, the Act also endows local governments with the authority to "enforce any requirement in any franchise regarding the providing or use of [public access] channel capacity." *Id.* § 531(c).

Pursuant to the 1984 Cable Act, public access channels are thus entirely the creation of local or state governments—and if the governments so choose, can be operated as public forums. The House Report for the 1984 Act described public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 98-934 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667.

In this respect, the 1984 Cable Act enshrined prior practices. Manhattan's first public access stations, for example, were established in the early 1970s. Resp. Br. 6. Those channels relied on "cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers." *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 628 (1994). Installation of the cables often required the physical uprooting of public streets to enable the establishment of the cable system. *Id.* In those early days of cable television, public access channels were

largely governed by franchise agreements between local governments and cable operators. Resp. Br. 4 (citing *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 788 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

Although the 1984 Cable Act disallows cable operators (here, Time Warner) from exercising "editorial control" over any public access channel, § 531(e), it leaves significant discretion to state and local governments about whether, and if so how, to run such channels. *See id.* § 531(b) (stating that a local government "may require rules and procedures for the use of [public access] channel capacity"). Accordingly, different states and localities have chosen to run their public access channels quite differently, as reflected in their statutes and in many operating entities' ultimate programming policies. As we show below, in its choice to eliminate any content discretion from the public access channel operator, New York stands virtually alone.

2. New York State Law

New York's statutory scheme for public access channels is highly prescriptive. It requires local governments to establish a public access channel as part of any cable franchise above a certain size, and to designate an "entity" to operate the channel. N.Y. Comp. Codes R. & Regs. tit. 16, §§ 895.1(f), 895.4(b)(1), (c)(1). And New York state law sets forth strict parameters for how that entity must make broadcast decisions, both in terms of what to broadcast and when.

First, New York law requires that a public access channel operator broadcast any content that is protected by the First Amendment. New York law defines "public access channel" as "a channel designated for noncommercial use by the public on a first-come, first-served, *nondiscriminatory* basis." *Id.* § 895.4(a)(1) (emphasis added); *see also* Resp. Br. 27 n.9 (noting that MNN accepts that state law bars it from exercising editorial discretion). This means that the public access channel operator must broadcast material without reference to its content, unless the content is not protected by the Constitution. *See* 47 U.S.C. § 559 (making it a federal crime to transmit unprotected content); *see also* Community Access Organization "CAO" Grant and Use Agreement by and Between Time Warner Entertainment Company, L.P. and Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network § 4.1 ("CAO Agreement") (requiring MNN to comply with all local, state, and federal laws with respect to program content). Thus, MNN does not have the freedom to choose among the virtually infinite varieties of protected content; if the content is protected, MNN must broadcast it.[2]

Second, New York law requires the public access channel operator to schedule all First

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[2] New York further forbids cable franchisees (here, Time Warner) from "exercis[ing] any editorial control" over protected content, N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(8), and municipalities from "exercis[ing] any editorial control over any use by the public of a public access channel except as may be permitted by law." *Id.* § 895.4(c)(9).

Amendment protected content on a "*first-come, first-served*, nondiscriminatory basis." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(c)(4) (emphasis added). Together, these provisions eliminate any independent editorial discretion over content selection or scheduling.

Third, New York law establishes public oversight over the public access channel operator's content and scheduling decisions. It requires the public access channel operator to maintain records about how it fulfills its broadcasting duties by collecting the names and addresses of all persons using or requesting to use any public access channel. *Id.* § 895.4(c)(10). The law also requires the operator to make those records "available for public inspection for a minimum of two years." *Id.*

In combination, these regulations leave MNN no meaningful discretion about what content to broadcast or when; instead, New York law dictates the terms of all broadcast decisions and MNN must simply carry them out, subject to public oversight. This combination of regulations is exceedingly rare. It is entirely the result of the state's regulatory choices, and is not the approach taken by nearly any other state, or by New York in regulating any other broadcast or cable channels.[3]

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[3] Amici have been able to identify only two other states and a small number of local governments that also mandate this rule: Rhode Island, Hawaii, St. Louis, MO, and some towns in Minnesota. *See, e.g.*, 815 R.I. Admin. Code § 10-05-1.14.1; St. Louis City Ordinance 8.29.140. Some other state and local governments also offer a "first come, first served" scheduling rule—but only as one of many options available to its public

3. New York City Law

New York City ("the City") further entrenches this regulatory system through its agreements with cable franchisees. As required by state law, when the City entered into franchise agreements with Manhattan-area cable operators, it created public access channels and negotiated a proprietary interest in them for public access. *See* Resp. Br. 34. Time Warner Cable ("TWC" or "Time Warner") is the City's current franchisee, and the City requires TWC to dedicate six channels to public access content. *Id.* And, pursuant to the Manhattan Borough President's authority under the agreement, the City has designated MNN to administer the channels. *See* 2008 Cable Franchise Agreement by and between The City of New York and Time Warner Entertainment Company, L.P., §§ 1.18, 8.1.7–8.1.12 ("Franchise Agreement").

To carry out these requirements, TWC and MNN entered into another agreement, under which MNN must "comply with all applicable local, state, and federal laws with respect to program content on the Public Access Channels," including the first-come, first-served nondiscriminatory rule, and the prohibition on broadcasting content that is not protected by the First Amendment. *See* CAO Agreement § 4.1.

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access channel operators. *See, e.g.*, Minn. Stat. Ann. § 238.084(z) (expressly authorizing municipalities to determine whether or not public access channels must be "available for use by the general public on a first-come, first-served, nondiscriminatory basis"); West Sacramento Channel 21 Operating Rules and Procedures §§ 9.1, 10.1.

Further, the City dictates the terms under which TWC provides multi-million dollar grants to MNN and how such funds will be used. Franchise Agreement § 8.3; CAO Agreement §§ 2.1–2.3. Finally, the City retains some governmental influence over MNN's board of directors: the Manhattan Borough President appoints two individuals to MNN's Board of Directors, which currently includes ten directors, one director emeritus, and two non-voting members. *MNN Staff*, Manhattan Neighborhood Network, https://perma.cc/A2VX-7QUF; *see also* Resp. Br. 7 n.1.

4. Other State and Local Schemes Differ Markedly from New York's

Public access channels come in many forms. *Denver Area*, 518 U.S. at 762 (describing the wide-ranging "system of public, private, and mixed nonprofit elements [that], through its supervising boards and nonprofit or governmental access managers, can set programming policy and approve or disapprove particular programming services"). Most states and local governments have rules governing public access channels, but, unlike New York, the vast majority do not seek to eliminate all content discretion of the channel operator. Rather, most state and local laws prescribe broad goals for public access channel operators, and leave the operator substantial room for independent editorial judgment.

Tennessee, for example, has defined "PEG programming" as "local interest programming," such as local government meetings, community events, educational programming, and community news. Tenn. Code Ann. § 7-59-309. Similarly, in Coeur

d'Alene, Idaho, public access channel operators are directed to broadcast "information concerning local government and public education." Coeur d'Alene, Idaho, Mun. Code § 2.100.040.

In Illinois, local governments choose to give their public access channel operators discretion. Chicago Access Network Television ("CAN TV"), administered by amicus CAC, for example, has the discretion to "impose reasonable limitations" in order to facilitate a number of goals, including "representative diversity of programming," "overall composition and flow," "building viewership with a viable program schedule," and "scheduling flexibility." CAN TV Access User Manual § II.A, https://cantv.org/wp-content/uploads/2018/11/2018-User-Manual-1.pdf. In addition, CAN TV defines its own scheduling priorities, which give preference to local and timely programming. *Id.* § II.B.

In Springfield, Ohio, public access channel operators can broadcast "accurate information on local municipal government affairs, on matters which would promote the public peace, health, safety, welfare and attractiveness of the community and on matters which would promote responsible citizenship in the community." City of Springfield, Ohio, Codified Ordinances § 121.04. These standards leave broad discretion for content choices by the public access channel operator.

Oklahoma leaves its municipalities the choice of whether or not to require public access channels at all. Where public access channels are established, Oklahoma law gives their operators the option of "provid[ing] a '*family friendly*' tier of video services in lieu of . . . public access." Okla. Stat. Ann. tit. 11,

§ 22-107.1(D) (emphasis added).

Los Angeles takes perhaps the most discretionary approach. There, the Cable Television Access Corporation exercises its discretion to broadcast what it deems "the 'Best Of' Public Access programming in the City of Los Angeles." Public Access Guidelines, L.A. Cable Access Corp., https://perma.cc/JE7W-P87H.

In addition to discretion to make content decisions, other state and local governments also offer public access channel operators varying amounts of discretion about scheduling. For example, in West Sacramento, California, public access channel operators can schedule programming "according to particular themes (e.g., public affairs, sports, ethnic, etc.)" and based on the "production quality of programs." West Sacramento Channel 21 Operating Rules and Procedures § 9.1, https://www.cityofwestsacramento.org/home/showdocument?id=712.

As these examples show, state and local governments can decide to give public access channel operators broad editorial discretion. And they have done so in a wide variety of ways, creating discretion to do everything from airing the "best of" content to profiling issues of local concern to catering specifically to children. But states may also choose, as New York has here, to take full responsibility for content selection by dictating the terms in such a way as to eliminate private editorial judgment altogether.

ARGUMENT

I. THE STATE ACTION INQUIRY IS DESIGNED TO IDENTIFY WHEN THE STATE IS RESPONSIBLE FOR A PARTICULAR ACTION.

MNN should be deemed a state actor for purposes of its content decisions because it is New York, not MNN, that has determined the rules that govern all content decision-making on a channel designated by law for free government service, and those rules deny MNN any independent editorial control. By definition, any content decision MNN makes is therefore an implementation of New York's terms, which wholly control content aired on its public access channel.

The state action inquiry exists to determine whether nominally private conduct can "be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *see also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (formulating the inquiry as whether the action "may be fairly treated as that of the State itself").

This inquiry is essential for two reasons. On the one hand, it allows courts to preserve "an area of individual freedom by limiting the reach of federal law;" on the other, it "assure[s] that constitutional standards are invoked when . . . the State is responsible." *Brentwood*, 531 U.S. at 295 (internal marks and alterations omitted). The latter assurance is necessary because "[t]he Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392

(1995) (quoting *Ex parte Virginia*, 100 U.S. 339, 346–347 (1879)). Given this combination of interests, properly applying the state action inquiry requires a fine balance. Expanding the reach of state action too far could intrude impermissibly on the freedom of private actors, who are generally not subject to the Constitution even when they perform functions at the government's behest or subject to regulation. At the same time, if the Court is too restrictive about identifying state action, government actors would be able to sidestep the Constitution by nominally delegating authority to private entities while actually retaining governmental control.

"What is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood*, 531 U.S. at 295. Indeed, this Court has defined state action broadly as "necessarily following upon 'state participation through any arrangement, management, funds or property.'" *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (quoting *Cooper v. Aaron*, 358 U.S. 1, 4 (1958)). At the same time, the Court has specified "a host of facts that can bear on the fairness of such an attribution." *Brentwood*, 531 U.S. at 296.[4] "Whether these different tests are actually

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[4] For example, the Court has found state action where (1) "the State creates the legal framework governing the conduct," *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988); (2) the State exercises "coercive power" or (3) "significant encouragement, either overt or covert," *Brentwood*, 531 U.S. at 296 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)); (4) a private actor and the state willfully engage in "joint activity," *id.* (quoting *Lugar*, 457 U.S. at 941); (5) an "agency of the State" controls the private actor, *id.* (quoting *Pennsylvania v. Board of*

different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court," *Lugar*, 457 U.S. at 939, "they all have a common purpose. [The] goal in every case is to determine whether an action 'can fairly be attributed to the State.'" *Brentwood*, 531 U.S. at 306 (Thomas, J., dissenting) (quoting *Blum*, 457 U.S. at 1004).

Achieving that goal requires a "necessarily fact-bound" inquiry. *Lugar*, 457 U.S. at 939; *see also Evans*, 382 U.S. at 299. Each case must be assessed on its own facts, and while "[f]acts that address any of the [state action] criteria are significant, . . . no one criterion must necessarily be applied." *Brentwood*, 531 U.S. at 303. Rather than requiring strict adherence to any specific test, this Court has insisted on "careful attention to the gravamen of the plaintiff's complaint" in considering whether a case presents state action. *Blum*, 457 U.S. at 1003. Engaging in such an inquiry here reveals that MNN's challenged conduct was state action.

Directors of City Trusts of Philadelphia, 353 U.S. 230 (1957) (*per curiam*)), (6) the State delegates a public function to a private actor, *id.* (citing *West v. Atkins*, 487 U.S 42, 56 (1988)); (7) the private actor and government are "entwined," either through governmental policies or the government's involvement in the private actor's management or control, *id.* (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)); and more. As this list shows, the dissenting judge below and Petitioners both oversimplify existing doctrine by suggesting that there are five discrete state action tests.

II. ALL OF MNN'S DECISIONS REGARDING WHAT CONTENT TO BROADCAST ARE STATE ACTION.

A. MNN's Broadcast Decisions are State Action Because State Law Dictates a "First-Come, First-Served" Policy That Leaves MNN No Discretion Over Broadcast Decisions in the Provision of a Free Government Service.

MNN's conduct in this case constituted state action because government regulation wholly determines MNN's broadcast and scheduling decisions: under New York law and the contracts required by the City, MNN had to broadcast Respondents' program, as First Amendment protected content, "on a first-come, first-served, nondiscriminatory basis." N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(a)(1).

MNN is, moreover, providing a government service free of charge over a public easement. As described above, New York City negotiated with TWC to preserve a proprietary interest in the public access channel, *see* Resp. Br. 34, and designated MNN to administer that channel, *id.* at 36. It retains the power to appoint two of MNN's board members, and it continues to require that access to the channel remain free to the public by law.

These facts make all of MNN's decisions about what content to broadcast "fairly attributable to the State." *Lugar*, 457 U.S. at 937. The Court has recognized that a regulatory regime that dictates the choice a private actor must make establishes state

action. In *Adickes v. S.H. Kress & Company*, for example, this Court held that where "the . . . act by the private party is compelled by a statutory provision . . . it is the State that has commanded the result by its law." 398 U.S. 144, 171 (1970). In *Adickes*, the Court held that "a state-enforced custom" dictating a particular result was enough to create state action. Here, express state law displaces all independent editorial judgment and wholly dictates MNN's content decisions.

Similarly, this Court has held that nominally private action should be treated as state action when it "becomes not [the purportedly private actor's] voluntary choice but the State's choice." *Barrows v. Jackson*, 346 U.S. 249, 254 (1953). In *Barrows*, the state's power to impose sanctions on a private actor for making a particular choice transformed the private actor's choice from voluntary to state-determined. Here, the same effect is created by the fact that the 1984 Cable Act endows local governments with the authority to "enforce any requirement in any franchise regarding the providing or use of [public access] channel capacity," 47 U.S.C. § 531(c), and by New York's choice to impose a "first come, first served" regulatory requirement for all protected speech. N.Y. Comp. Codes R. & Regs. tit. 16, §§ 895.4(a)(1), (c)(4).

The state action here is bolstered by the fact that MNN and New York City are "willful participant[s] in [the] joint activity," *Brentwood*, 531 U.S. at 296, of maintaining the public access channel. In essence, the City entered into franchise agreements that allowed Manhattan-area cable operators to build infrastructure on city property, in

exchange for which the City required them to provide public access channels. *See* Resp. Br. 34. The City retained operational authority over the public access channels, in the form of what might be described as a technological easement. The City designated MNN as its agent to operate the public access channel in 1991, under strict terms that control its every content decision. *Id.* 7, n.1. MNN has, in turn, entered into the CAO Agreement, which requires MNN to "comply with all applicable local, state, and federal laws with respect to program content on the Public Access Channels"—again including the first-come, first-served rule for protected speech. CAO Agreement § 4.1.

The critical role played by the "first-come, first-served" law in the state action inquiry here is made clear by two cases in which this Court declined to find state action, *precisely because state law did not dictate the private entity's decision.* In *Blum v. Yaretsky*, the Court found no state action where statutes and regulations required physicians or nursing homes to complete forms relating to patient discharge or transfer decisions, but did not mandate the substance of those decisions, which "*ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State.*" 457 U.S. at 1008 (emphasis added). Similarly, in *American Manufacturers Mutual Insurance Co. v. Sullivan*, the Court held that private insurers are not state actors because "the decision to withhold payment, like the decision to transfer Medicaid patients to a lower level of care in *Blum*, is made by concededly private parties, and *turns on judgments made by private parties without standards established by the State.*"

526 U.S. 40, 52 (1999) (internal marks omitted and emphasis added). Here, by contrast, the standard governing MNN's choice as to content has been established by the state, and has wholly displaced private decision-making, such that MNN's content decisions cannot be said to be its own private judgments.

When government standards, rather than private-sector standards, dictate the result a nominally private actor must reach, circuit courts have accordingly found state action. For instance, in *Focus on the Family v. Pinellas Suncoast Transit Authority*, the Eleventh Circuit found that a nominally private actor responsible for approving or rejecting advertisements in bus shelters engages in state action "where the state contractually requires the private actor to take particular actions—e.g., to reject proposed advertisements under certain specifically delineated circumstances." 344 F.3d 1263, 1278 (11th Cir. 2003).

Similarly, in *Catanzano by Catanzano v. Dowling*, the Second Circuit held that the decisions made by home health care service providers about whether and how to provide home health care to Medicaid recipients constituted state action because "[s]ignificantly, unlike in *Blum*, the decisions made by the [home health care providers] are not purely medical judgments made according to professional standards. Instead, [a New York statute] requires the[m] to determine whether the health and safety of the recipient can be maintained 'as defined by the department of health in regulation.'" 60 F.3d 113, 119 (2d Cir. 1995); *see also Kraemer v. Heckler*, 737 F.2d 214, 220 (2d Cir. 1984) ("[T]here is a far

stronger basis for finding state action in the decisions [of nominally private parties] which evaluate entitlement to Medicare benefits" in part because the "decision-making process itself appears to be governed largely by statute, regulation, HCFA manuals, and transmittal letters.").

In *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008), the Second Circuit likewise found that an accounting firm's decisions about whether to pay defendants' legal fees based on whether or not they "cooperated" constituted state action in part because the government *defined the standard* for what constituted "cooperation." Unlike the physicians and nursing homes in *Blum*, the court explained, the firm in *Stein* "was never 'free to define' [the relevant standard] independently" of the government. *Id.* at 149. Rather, the government defined cooperation, and the private entity was bound by that definition. *Id.*

Similarly, MNN is not "free to define" what content to air on its public access channels. New York has removed any private discretion by requiring MNN to grant airtime to any content protected by the First Amendment in the order that MNN receives it. *See* N.Y. Comp. Codes R. & Regs. tit. 16, §§ 895.4(a)(1), (c)(4). As in *Focus on the Family*, *Catanzano*, and *Stein*, the government has set forth the standards by which the nominally private actor, MNN, must make its decision. MNN cannot rely on any independent criteria or otherwise exercise independent discretion when determining whether to broadcast particular content. Accordingly, its broadcast decisions constitute state action.

By contrast, had New York permitted MNN to operate a public access channel pursuant to a broad delegation of editorial control—for example, by directing it to broadcast programs that are of local interest, as in Tennessee; by specifying only that it be family friendly, as in Oklahoma; or by permitting it to choose to focus on building viewership and representing diversity, as in Chicago—MNN would be left substantial discretion to make independent decisions about what content to broadcast. Those decisions would generally not be fairly attributable to the state, precisely because the state rule would have afforded the private entity broad latitude for its own private decision-making. Here, instead, New York law essentially occupies the field with respect to content selection, compelling MNN to operate the station on a "first-come, first-served" basis without any of its own editorial discretion.

Under this narrow approach, MNN's other actions—for example, its employment or contracting decisions—would not necessarily be state action. The question presented by this case is merely whether MNN is a state actor *for the purpose of selecting and scheduling the content it broadcasts*. The fact that one part of a private entity's conduct constitutes state action need not rob it of its private designation for other conduct. *See, e.g., Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981) (holding that, while a public defender is not engaging in state action when she advocates for her client, she may be engaging in state action when she "perform[s] . . . functions" for the state, notwithstanding the fact that the state is her employer in both cases). MNN is not necessarily a state actor with respect to the many other activities as to which it enjoys discretion to act independently.

It is, however, a state actor for the purpose of selecting and scheduling content.

B. The Fact that MNN's Particular Decision Apparently Misapplied the State's Rules Does Not Defeat State Action.

Amicus Chicago Access Corporation ("CAC") argues that because MNN's action seems to have contravened, rather than enforced, the "first-come, first-served" rule, MNN did not act "under color of state law," and its actions are not attributable to the state. CAC Amicus Br. 9–11. But because MNN has been delegated authority to administer a government service over a public easement under a "first-come, first-served" rule that eliminates any private discretion over content, MNN's *every* content decision is controlled by, and therefore attributable to, the state.

MNN cannot make any content decisions except pursuant to New York's content rule, which affords MNN no independent editorial judgment. That MNN may have *misapplied* state law does not mean that it is not a state actor, any more than the fact that a police officer violates his departmental rules on use of lethal force relieves his actions from constitutional constraint. Respondents claim that MNN's application of the New York state rule to them violated the First Amendment. Because the state is the source of the rule, the city delegated authority to implement the rule to MNN, and the state rule leaves MNN no independent private discretion, MNN's actions are properly attributable to the state.

This can be illustrated by a slight variation on the facts. If MNN rejected Respondents' content on the ground that it deemed the speech unprotected by the First Amendment, surely Respondents would have a First Amendment claim, precisely because MNN, as the city's delegate, would be implementing a state-imposed rule that affords no room for discretion. (Because speech is either constitutionally protected or not, there is no room for discretion.) Whether MNN *erred* in concluding that the content in question was unprotected would not make its actions private rather than state action. So, too, here. The fact that MNN may have misapplied the "first-come, first served" rule does not transform state action into private action.

In this way, this case is akin to a state official "in the exercise of the authority with which he is clothed, misus[ing] the power possessed to do a wrong forbidden by the [Constitution]." *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913); *see also United States v. Classic*, 313 U.S. 299, 326 (1941). Such violations are governed by the Constitution regardless of the violation of state law. *Classic*, 313 U.S. at 326.

CAC relies heavily on *Lugar*. But that case is distinguishable. There, the Court held that the mere fact that a private party invokes a statutory prejudgment attachment remedy does not transform the private party's wholly discretionary choice to invoke the attachment regime into state action. *Id.* at 939. *Lugar* held that "[a]ction by a private party pursuant to this statute, without something more, [i]s not sufficient to justify a characterization of that party as a 'state actor.'" *Id.* But here, there is

"something more." Unlike the private party in *Lugar*, which had full discretion to seek attachment, here MNN has *no discretion* whatsoever with respect to broadcast content decisions. The state rule wholly displaces private decision-making. And MNN is not any private party, but an entity explicitly delegated authority to administer access to a government service over a public easement.

C. The Court Need Not Reach the Public Function or Public Forum Questions to Resolve this Case.

Because state action flows from the state's decision to leave MNN no independent editorial discretion whatsoever in administering its public access channel, the Court need not reach the question of whether this or any other public access channel is a public forum—or whether maintenance of a public forum constitutes a public function, as Respondents maintain. The fact that federal, state, and city law have combined to dictate the only decision MNN can properly make about whether and when to broadcast content on the public access channel is sufficient for the state action inquiry. Accordingly, the Court can follow the approach it took in *Denver Area* and decline to address whether public access channels in general constitute public forums. It is "unwise and unnecessary definitively to pick one analogy or one specific set of words" as public access channels come in many different forms. *Denver Area*, 518 U.S. at 742.

The question presented by this case is not whether all public access channels are public forums, or whether all public access channel operators are state actors. It is only whether MNN in particular is

a state actor for purposes of content decisions under the special rules imposed by New York and New York City. The state action inquiry asks whether conduct can fairly be attributed to the state. The public forum inquiry asks whether a particular space or medium must be open to the public for speech purposes, either as a matter of tradition or through government designation. These are distinct inquiries.

Of course, the specific rule New York has chosen to impose—first-come, first-served for any content protected by the First Amendment—is highly relevant to *both* the state action and public forum inquiries. The choice to open a channel for speech on a first-come, first-served basis strongly supports the establishment of a designated public forum. *See, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (noting that government action in both traditional and designated public forums is bound by the same standards). And New York's "first-come, first-served" rule also renders MNN's content decisions attributable to the state because the state has so completely displaced MNN's independent editorial judgment.

But while the facts of this case may support both a finding of state action and public forum status, the underlying theories are ultimately distinct, and the Court need not determine whether or not public access channels generally, or under New York law specifically, constitute public forums in order to resolve this petition.

Nor need the Court determine whether maintaining a public access channel is a "public function" traditionally reserved to government. Even if it is not, the combination of laws applicable here

displaces private judgment by wholly dictating all content decisions with respect to a free service provided on property in which the state maintains a proprietary interest. That is sufficient to establish state action.

A finding of state action here will not implicate the status of the vast majority of other public access channel operators, much less of wholly private actors that operate large-scale communications platforms, like Facebook, Twitter, and YouTube. It is a red herring to suggest that if Petitioners are state actors in this case, all other public access channels and social media platforms are, too. As shown above, most states and localities afford substantial independent editorial discretion to their public access channel operators. A finding of state action here, based on the complete preclusion of independent editorial discretion, will have no bearing on the status of different public access channel arrangements.

D. A Finding of State Action Here Will Have No Untoward Consequences for Private Media Providers.

Finally, finding MNN to be a state actor for purposes of its content decisions would have no implications whatsoever for private social media platforms that choose content on their own terms. It is settled law that the mere fact that private entities open their property for public use—which is the similarity some amici appear to see between MNN and social media companies, *see, e.g.*, EFF Br. 4–10, Internet Association Br. 16, Cato Br. 13—does not transform the space into a public forum. *Hudgens v. Nat'l Labor Relations Bd.*, 424 U.S. 507, 519 (1976).

Indeed, as amici argue, a private platform's independent decision to accept content of a particular type is generally a manifestation of the private party's own expressive choices, itself likely protected by the First Amendment and other constitutional provisions. Nor does a private entity's independent choice to accept a broad variety of content even remotely create state action.

The facts presented by this case could not be more different from the operation of social media companies. Unlike social media companies, MNN has authority to run the public access channel *only* because that authority has been delegated to it by the city and state, and the public access channels it manages exist only because the city has demanded that they be created as a condition on cable operators' access to public rights of way. Social media platforms were not created by the government, nor are their operators chosen by the government. Moreover, as discussed at length above, the statutory regime governing the operation of public access channels in New York takes a uniquely heavy hand in dictating MNN's content decisions; social media companies' content decisions are not governed by regulation that is in any way similar. To the contrary, federal law generally shields them from liability for how they moderate content created by third parties. *See* 47 U.S.C. § 230(c).[5]

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[5] Lower courts have considered whether public officials who block individuals from commenting on their social media pages violate the First Amendment. *See, e.g.*, *Davison v. Randall*, No. 17-2002, 2019 WL 114012 (4th Cir. Jan. 7, 2019), *as amended* (Jan. 9, 2019); *Leuthy v. LePage*, No. 1:17-CV-00296-JAW, 2018

In general, common carriers are likewise entirely different. The fact that a private business is heavily regulated does not make it a state actor. *Jackson*, 419 U.S. at 350. Here, the state has not merely sought to regulate a private business. Rather, it has used its sovereign authority to negotiate a public proprietary interest in public access channels, and then delegated the implementation of a free government service on that channel to MNN pursuant to strict terms that wholly control its content decisions.

Thus, if the Court conducts the careful, fact-bound inquiry as suggested here, the parade of horribles envisioned by Petitioners and other amici will not come to pass. Unlike MNN, public access channel operators in most states are not statutorily required to broadcast all protected speech on a first-come, first-served basis. And the circumstances of social media sites and other online platforms lie even further afield. This case asks the Court only to determine whether MNN engaged in state action, and the Court can easily answer "yes" without

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WL 4134628 (D. Me. Aug. 29, 2018); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), *appeal docketed*, No. 18-1691 (2d Cir. June 5, 2018). Such cases have considered, first, whether public officials engage in state action when they administer a social media account, or whether they are acting as private speakers. Only upon finding state action have courts considered whether a public official's social media page constitutes a public forum. This case presents only an analog of the first question, and does not implicate the second—much less whether all social media platforms are public forums, a question not raised by any of these cases.

disturbing the operation of nearly any other public access channel or that of online platform operators.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

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No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,
Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Circuit erred in failing to apply this Court's "state action" tests and in adopting a *per se* rule that private operators of public access channels are "state actors" for constitutional purposes, even where the state has no control over the private entity's board, policies, programs, facilities or operations, provides none of its funding, and is not alleged to have been involved in the conduct challenged in the pleadings.

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INTEREST OF *AMICUS CURIAE* [1]

The Cato Institute is a nonpartisan, public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs.

Consistent with its values, Cato believes that the Bill of Rights, including the First Amendment, must be preserved as a safeguard against government infringement on individual liberty, rather than used to burden private citizens in the resolution of their disagreements with other private citizens. The Second Circuit's expansive view of the "state actor" requirement improperly treated private parties as creatures of the state without considering whether those parties' speech and editorial decisions were subject to meaningful state control.

Cato offers this brief in support of Petitioner to protect the idea of state action that is at the heart of the First Amendment. The decision below illegitimately reads the state actor requirement out of the state actor test and in so doing imperils the free expression that the First Amendment protects.

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, counsel for all parties received timely notice of *amicus*'s intent to file this brief, and consented in writing. No counsel for any party authored this brief in any part; no person or entity other than amicus or its counsel made a monetary contribution to fund its preparation or submission.

SUMMARY OF ARGUMENT

The First Amendment, by its very terms, restricts actions by the state, not those of private persons. The only way the Constitution could burden a private person with the duty to "make no law . . . abridging the freedom of speech" is if that person stood in the shoes of the state. This Court's "state action" precedents establish that this requisite control by, or complicity with, the state is absent unless the person is either acting jointly with the state, performing a public (*i.e.*, a state) function, or being compelled by the state to act. As applied to a case like this, the appropriate question therefore is whether the private person's speech or editorial decisions can fairly be attributed to the state, not whether the state has in some way allowed the person to operate in what can be described as a public forum.

The need for Respondents to show that the state acted in concert with Petitioners to the extent of controlling their editorial decisions stems from the very nature of the Bill of Rights. A state has certain powers that private parties do not. The Founding Fathers created the Bill of Rights to circumscribe those uniquely governmental powers with duties uniquely applicable to the state. For example, because the state has the power to search and seize private property or deprive a person of life, liberty, or property, the Constitution places limits on the state's ability to exercise those powers, such as the requirements to get a warrant (Fourth Amendment) or provide due process (Fifth Amendment).

So too when it comes to the First Amendment. Allowing the state unfettered power to interfere with the flow of speech in the marketplace of ideas would

allow the state to alter discourse and consequently interfere with the search for truth. The First Amendment therefore prevents the state from restricting who may speak and what they can say. This risk of abuse of power is absent, though, when a private person is speaking or—as relevant here—deciding who may use its property to speak. Allowing lawsuits that challenge the editorial decisions of private persons who promote speech via their private property would unduly and unnecessarily stifle the free flow of speech in the marketplace of ideas. Thus, while Petitioners should prevail here, it is of even greater importance for this Court to clearly hold that the First Amendment does not saddle a private person with burdens that were created to check state power, unless that person is standing in the state's shoes.

ARGUMENT

I. THE MARKETPLACE OF IDEAS FUNCTIONS BEST WHEN STATE ACTORS CANNOT IMPAIR THE SPEECH AND EDITORIAL RIGHTS OF PRIVATE ACTORS.

This Court has often used the "marketplace of ideas" as a metaphor to illustrate the benefits of free speech. When private participants in the marketplace of ideas are free to propose, debate, and accept or reject ideas, the marketplace becomes a powerful identifier of true and superior ideas.

State interference distorts the marketplace of ideas. The state's unique coercive powers would allow it to elevate favored speech, suppress disfavored speech, and—in so doing—tilt the entire marketplace

in its favored direction. Private participants, on the other hand, lack the state's coercive power in the marketplace. The inability of private parties to tilt the marketplace of ideas explains why the First Amendment proscribes only *state* interference with speech.

A. A Robust Marketplace of Ideas Is an Optimal Environment for the Emergence of True and Superior Ideas.

Nearly 100 years ago, Justice Holmes wrote that "the theory of our Constitution" is that "the ultimate good desired is better reached by free trade in ideas," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In so writing, Justice Holmes succinctly captured one of the foremost theories animating the First Amendment's protections of free speech.

The apt metaphor of a "market" in which speakers can trade in ideas "conceptualized the purpose of free speech so powerfully that" Justice Holmes' *Abrams* dissent "revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech." Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 Duke L.J. 821, 823–24 (2008). The "marketplace of ideas," as Justice Brennan later put it, *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring), has since become a staple of the Court's free speech jurisprudence. *See, e.g., Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 295 (1981) ("The Court has long viewed the

First Amendment as protecting a marketplace for the clash of different views and conflicting ideas."); *see also* Blocher, *supra*, at 825 n.7 (collecting First Amendment cases in which the Court has relied on the concept of a marketplace of ideas). Indeed, the Court reaffirmed Justice Holmes' observations about the marketplace of ideas as recently as last Term. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) ("*NIFLA*") ("The best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." (alteration omitted) (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting))).

Believers in free speech have long recognized the importance of a robust exchange of ideas in the search for truth. In 1644, John Milton wrote,

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

John Milton, *Areopagitica* 58 (Cambridge, The University Press 1918) (1644), https://tinyurl.com/y7muykoj. In 1859, John Stuart Mill also argued that the free exchange of ideas enables truth to overcome error, and added that encountering erroneous ideas *benefits* participants in the marketplace:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is

> right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

John Stuart Mill, *On Liberty*, *in* 18 Collected Works of John Stuart Mill 213, 229 (Univ. of Toronto Press 1977), https://tinyurl.com/yar4am3f.

Mill further argued that the best approach for "knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind." *Id.* at 232. Indeed, according to Mill, it is not "in the nature of human intellect to become wise in any other manner" and "[t]he steady habit of correcting and completing [one's] own opinion by collating it with those of others . . . is the only stable foundation for just reliance on it." *Id.*

When the marketplace of ideas is functioning properly, not only do those who participate benefit, but so does society. Mill wrote that "[w]rong opinions and practices gradually yield to fact and argument." *Id.* at 231. When flawed ideas give way to superior ideas, the societal customs and traditions that are founded on those ideas give way as well. This progression benefits all of society.

In fact, the process is doubly beneficial because a robust marketplace of ideas continually retests even the ideas that emerge as true and superior. Some of yesterday's "best" ideas are replaced with better ones today, and some of today's "best" ideas will be replaced with better ones tomorrow. *Cf.* Guy Sorman,

Schumpeter in the White House, City Journal (Spring 2012), https://www.city-journal.org/html/schumpeter-white-house-13462.html (under the economic theory of "creative destruction," "progress in a capitalist economy requires that the old give way constantly to the new: production technologies in a free economy improve constantly, and new products and services are always on offer"). Hence freezing the marketplace at any point risks entrenching ideas that will eventually become obsolete, and depriving the public of superior ideas yet to come.[2]

B. State Interference Distorts the Marketplace of Ideas Through Coercion.

Unlike private participants in the marketplace of ideas, the state possesses power "to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). This power arises from the government's unique capacity to compel behavior and impede personal freedom. *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 236 (1992) ("The state is the law, and the law is final—even when the law appears in the humble guise of a municipal ordinance.").

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[2] Many subjects of discussion in the marketplace of ideas, such as the arts, are a matter of preference. The pluralism of the marketplace is better suited than is the state to meeting the diverse preferences of market participants on these subjects too. *See* Tyler Cowen, *In Praise of Commercial Culture* 1 (1998) ("The capitalist market economy is a vital but underappreciated institutional framework for supporting a plurality of coexisting artistic visions . . . .").

This coercive power enables the state to "distort the market for ideas" in a way that private parties cannot. *Leathers v. Medlock*, 499 U.S. 439, 448 (1991).[3] The state's power does not just clash with private speech in the marketplace—it tilts the entire marketplace itself. When the state elects to support certain speech, its coercive power disproportionately elevates that speech in the marketplace. *See* Edmund Burke, *Letter No. 1. On the Overtures of Peace (1796), in* 3 Select Works of Edmund Burke 59, 148 (Liberty Fund, Inc. 1999), https://tinyurl.com/ydecpqyx ("Reason, clearly and manfully delivered, has in itself a mighty force; but reason, in the mouth of legal authority, is, I may fairly say, irresistible.").

Similarly, when the state elects to suppress certain speech, its coercive power disproportionately quiets—and in some cases, silences—that speech in the marketplace. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) ("[W]henever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas . . . ."); *Simon & Schuster, Inc. v. Members of*

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[3] This is similar to the distortive effect of state interference in economic markets. *See, e.g.*, Murray N. Rothbard, *Man, Economy, and State with Power and Market* 1061 (Ludwig von Mises Inst. 2d ed. 2009), https://tinyurl.com/y8nrn4t9 ("Coercive intervention . . . signifies *per se* that the individual or individuals coerced would not have done what they are now doing were it not for the intervention."); A. Barton Hinkle, *Government Incentives to Business Distort Free Market Forces*, Reason.com, https://reason.com/archives/2015/07/27/government-incentives-to-business-distor (July 27, 2015) ("Government incentives to business interfere with [the free market] process. They take resources out of the economy and redirect them in ways they would not otherwise go.").

N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.").

"[T]he people lose when the government is the one deciding which ideas should prevail." *NIFLA*, 138 S. Ct. at 2375. This is because, among other reasons, state interference in the marketplace of ideas risks the acceptance of ideas that the market would otherwise have rejected, and the rejection of ideas that the market would otherwise have accepted.[4] Indeed, coercive state interference can influence the acceptance of an idea in the marketplace without regard for its "truth." Such a result runs contrary to the principle underlying the marketplace of ideas, that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

State interference does more than just directly alter the marketplace of ideas; it chills future speech. *See* Frederick Schauer, *Fear, Risk and the First*

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[4] State intervention is undesirable even if the marketplace is independently inclined towards an idea the state favors. Mill argued that silencing erroneous speech deprives the marketplace of a "clearer perception and livelier impression of truth, produced by its collision with error." Mill, *supra*, at 229.

Moreover, as discussed *infra* at 9–10, state intervention sets a precedent that chills speech in the future. Thus, even if the state's favorite ideas temporarily align with the marketplace's, the risk of distortion remains because the state's power can entrench ideas that the marketplace otherwise might have replaced.

Amendment: Unraveling the "Chilling Effect," 58 B.U. L. Rev. 685, 693 (1978) ("Deterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, and indeed, should."). For example, jailing a speaker for what he says likely will discourage other potential speakers from expressing their ideas, for fear of state retribution. This deprives the marketplace of the opportunity to consider fully the ideas of these potential speakers too. *See id.* (The deterrence of speech "is to be feared not only because of the harm that flows from the non-exercise of a constitutional right, but also because of general societal loss which results when the freedoms guaranteed by the first amendment are not exercised.").

The First Amendment protects the freedom of speech from state interference. By its very terms, the provision directs that "Congress shall make no law . . . abridging the freedom of speech." When courts properly interpret the First Amendment to prevent state interference, the marketplace of ideas is left to function properly. Thus, "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641; *see also Cohen v. California*, 403 U.S. 15, 24 (1971) (stating that the "right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion," thereby "putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity").

C. Private Actors Must Have Freedom to Control Speech Within Their Spheres of Influence.

Concerns about state interference in the marketplace of ideas do not apply when a private actor lawfully controls speech within its "sphere of influence" through the exercise of its own rights. For example, a private billboard owner is free not to rent billboard space for a political message with which she disagrees. The owner has a right to avoid associating with the message, and certainly to avoid promoting the message. And the potential customer would have a right to pursue posting the message elsewhere. Likewise, a private company is free to insist, as a condition of employment, that employees not publicly disparage the company's products. In the end, a private actor's message can only exercise the power of persuasion in the marketplace of ideas; others remain free to ignore, debate, challenge, or accept the message.

To be sure, private participants in the marketplace vary in the amount of influence and resources they possess, but that is categorically different from the coercive power of the state. *See* Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 Sup. Ct. Rev. 129, 138 & n.41 (1988) (distinguishing private power from government power and stressing that "even the most powerful corporation cannot directly control the armed might of the state"). A private actor lacks the power that the state could wield to exclude viewpoints from the marketplace of ideas. *See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 153 (1973) (Douglas, J., concurring) ("[F]or one publisher who may suppress

a fact, there are many who will print it. But if the Government is the censor, administrative fiat, not freedom of choice, carries the day."). Accordingly, private actors are unable to tilt the marketplace of ideas in the same manner as state actors.

In fact, the marketplace of ideas functions best when private actors are left free to control speech within their spheres of influence. Private actors participate in the marketplace of ideas through both what they say and what they elect *not* to say, including what they prevent others from saying within their spheres of influence. Indeed, "individual decisions about speech—preferring some ideas and information to others, placing one's property at the service of some ideologies and not others—are central to the concept of a marketplace of ideas." Frederick F. Schauer, Hudgens v. NLRB *and the Problem of State Action in First Amendment Adjudication*, 61 Minn. L. Rev. 433, 448–49 (1977). This is particularly true of private actors who dedicate their property to expressive functions as they exercise discretion in determining what ideas and viewpoints to use their property to publish (and not to publish). *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (explaining that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising" and that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment").

A private actor's limitations on who may use that actor's property for speech and what ideas may be expressed on the actor's property stem from the private actor's rights of free expression—and therefore fundamentally differ from state limitations on speech. *See* Fried, *supra*, at 237 (explaining that "[p]rivate impositions and limitations [on speech] differ fundamentally from state impositions" because "they issue from the limiting person's own exercise of liberty").

Moreover, a private actor's use of his property for expressive purposes also arises from his possessory rights in property. *See* Gary Chartier, *An Ecological Theory of Free Expression* 21 (2018) ("Respecting people's justly acquired possessions provides a clear, simple, and robust basis for protecting their freedom of expression. Possessory rights determine who will have the right to speak where and using what media."); Fried, *supra*, at 237 ("Private impositions and limitations [on speech] . . . . derive from other private rights that the limiter might have: rights to privacy, or more commonly, rights to property."). Accordingly, the state's enforcement of private actors' property rights facilitates their use of property for expressive purposes and thus their participation in the marketplace of ideas. *See* Chartier, *supra*, at 13 ("Robust protections for just possessory rights ground and enable participation in the ecosystem of expression."). When the state properly limits its role to protecting property rights, "[p]eople's right to control their justly acquired possessions provides a powerful safeguard against interference with expressive activity." *Id.* at 14. The proper role of the state in such circumstances, then, is to allow private actors to safeguard their property

rights—including the right to choose *who* may use their property for speech and to express *which* ideas—through peaceful rather than violent means.

Treating private parties as state actors—especially as a constitutional mandate rather than a legislative condition that the private party may accept or reject—would require private parties to adhere to the same content-neutrality norms that constrain public entities and would consequently interfere with their free expression of ideas on their property. Indeed, a property owner subject to the limits of the First Amendment would be unable to deny the use of his property when he has legitimate concerns about the ideas the putative user might express. And that property owner would face a constant risk of litigation by those who believe content played a role in the allocation of finite resources to potential speakers. Subjecting private parties to the First Amendment's proscriptions would therefore cause them to lose control over what is expressed within their spheres of influence and restrict their ability to express views and ideas freely. Such a result would trivialize the very concept of the marketplace of ideas because private individuals, communities, and institutions—particularly those devoted to expressive functions—would be deprived of "rights to offer to, and consume from, the marketplace of ideas." Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes A Curse*, 45 UCLA L. Rev. 1537, 1617–18 (1998). In this sense, compelling private actors to "tolerate the speech of others in a way that the public sector must allow ultimately forfeits many of the very values of free expression" itself. *Id.* at 1606.

II. THE MARKETPLACE OF IDEAS IS BEST PRESERVED WHEN PRIVATE ACTORS, WHO ARE NOT DOING THE BIDDING OF THE STATE, RETAIN THEIR FIRST AMENDMENT FREEDOMS.

The values underlying the First Amendment are best served by limiting government interference with speech and maintaining a private sphere in which private actors retain the freedom to choose which ideas and values to pursue. The "state actor" requirement is critical to maintaining such a private sphere by ensuring that the First Amendment's proscriptions are only imposed on the state—and not private parties who act as private parties. As this Court has explained, "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982); *see also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (stating that the state action doctrine furthers the constitutional objective of permitting citizens to structure private relations).

The decision below improperly rewrites the state action requirement, thus significantly expanding the circumstances in which private parties may be subjected to the First Amendment's proscriptions. In particular, the decision shifts the focus of the state action analysis away from whether the state exercised control over the private party's speech or editorial decisions to look instead at the nature of the forum where the speech occurred.

A. A "State Actor" Requirement that Focuses on Meaningful State Control Over Speech Content Correctly Distinguishes Between State and Private Actors in the Marketplace of Ideas.

In determining whether a private entity can be treated as a state actor, this Court has focused on whether the state exercises meaningful control over the private entity's conduct, here the entity's editorial decisions. This Court has explained that for the conduct of a private entity to be "fairly attributable" to the state, there must be "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal quotation marks omitted). "The purpose of" the close-nexus "requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original).

This Court has accordingly set forth three tests for determining whether the requisite control by, or complicity with, the state exists such that a private entity may be treated as a state actor: (1) the entity acts pursuant to the "coercive power" of the state or is "controlled" by the state (the "compulsion test"); (2) the state provides "significant encouragement" to the entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies (the "joint action test"); and (3) the entity "has been delegated a public

function by the [s]tate," (the "public function test"). *Brentwood Acad.*, 531 U.S. at 296–97, 303 (internal quotation marks omitted). In contrast, "[a]ction taken by private entities with the mere approval or acquiescence of the [s]tate" is not state action. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). Similarly, conduct by a private entity is not fairly attributable to the state merely because the private entity is a business subject to extensive state regulation or "affected with the public interest." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350–53 (1974) (rejecting argument that a private electricity provider is a state actor because the state conferred "monopoly status" upon the company).

By limiting the "state actor" requirement to circumstances in which the state exercises meaningful control over the speech and editorial decisions of private actors, courts can effectively limit state interference in the marketplace of ideas while preserving the full expression of ideas by private actors. Indeed, in circumstances where the state does not exercise control over what a private actor says or allows others to say, the private actor's limitations on the speech within, and originating from, that actor's sphere of influence is an exercise of that actor's rights of free expression. The First Amendment should not interfere with a private actor's speech decisions, including which speech it does *not* permit.

Focusing on meaningful state control over content resolves the related concern of state actors skirting their constitutional obligations by enlisting private actors to do their bidding. *Cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) ("It surely

cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). Meaningful control in this context would mean that the state imposed its editorial views on the private actor, much like the monkey's use of a cat's paw in Jean de La Fontaine's fable. *See* Jean de La Fontaine, *A Hundred Fables of La Fontaine* 140–41 (London, The Bodley Head 2d ed. n.d.). So long as a private actor in the marketplace of ideas is not doing the state's bidding on which ideas should be promoted or demoted, the First Amendment has no role to play.

B. The Decision Below Failed to Consider Whether Petitioners Exercise Meaningful State Control.

The panel majority below concluded that Petitioners engaged in "state action" when they suspended Respondents from airing programs on MNN's public access channels. However, in reaching this conclusion, the panel majority did not apply any of this Court's "state actor" tests.

Instead of looking for meaningful state control, the majority below found state action by focusing on the nature of the forum. The majority first concluded that public access channels are public forums because "[a] public access channel is the electronic version of the public square," and then reasoned backward to draw a conclusion about whether Petitioners are state actors. Pet. App. 13a. Moreover, the majority treated its public forum holding as all but dispositive of the state action question. Pet. App. 14a ("Because facilities or locations deemed to be public

forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations."). The majority reasoned that "whether the First Amendment applies to the individuals who have taken the challenged actions in a public forum depends on whether they have a sufficient connection to governmental authority to be deemed state actors," and concluded this standard was satisfied because the borough president designated MNN to run public access channels—a merely nominal connection between MNN and the state. Pet. App. 14a–15a (reasoning that the mere fact "that the Manhattan Borough President designated MNN to run the public access channels" creates "a sufficient connection to governmental authority" for employees of MNN "to be deemed state actors"). This cannot even be called "adherence," let alone "*[c]areful* adherence," *Lugar*, 457 U.S. at 936 (emphasis added), to the "state actor" requirement as established by this Court's precedents.

The majority's decision erroneously shifts the focus of the "state actor" requirement away from determining whether there is evidence of meaningful state control over a private party's editorial decisions. Instead, the majority's reasoning assumes it is the nature of the forum—rather than state control over how that forum decides who speaks or what they say—that determines whether the First Amendment's restrictions apply. Focusing the state actor question on the public nature of the forum—rather than meaningful state control of the speech itself—significantly dilutes the test for what constitutes state action and potentially subjects a wide range of

private actors to First Amendment regulations. Under the majority's decision, if a private actor opens its property for public use and owes the availability of its forum to the good graces of the state, the private actor will lose its freedom to choose the speech and ideas that may be expressed in that forum.

Such a result would undermine the editorial discretion of private actors who hold open their property for expressive purposes. These actors necessarily make editorial decisions about the speech and viewpoints that will and won't be expressed in a finite space. A public access channel, for example, cannot air every and any proposed content. A channel operator's decision to host certain content is therefore a decision to exclude all else. *See Freedom of Expression Act of 1983: Hearing on S. 1917 Before the S. Comm. On Commerce, Sci., and Transp.*, 98th Cong. 90 (1984) (statement of Roy M. Fisher, Professor and Dean Emeritus, Univ. of Mo. School of Journalism) ("[T]ime for a broadcaster is a finite property. Something else must go if the broadcaster is taxed to provide more complete coverage of an issue."). If the ruling below stands, the private actor's editorial decisions—including which speech to host—would expose that actor to lawsuits by those who assert that their views have been disfavored. This risk of costly litigation could chill the editorial process, preventing (indeed, forbidding) such private actors from exercising *their* First Amendment right to select which speech to express based on its content or viewpoint. Faced with the threat of liability for the mere exercise of editorial control, some private actors may abstain from dedicating their property to expressive purposes, and in the case of public access

channels, which are required by law to be held open to the public, the threat of constitutional liability may dissuade private actors from agreeing to operate the channels in the first place.

In sum, allowing this decision to stand would shrink the sphere in which private actors are free to pursue diverse ideas and values, thus allowing the First Amendment's *proscriptions* to undermine the values embodied in its *protections*.

III. FAILURE TO ENFORCE THE "STATE ACTOR" REQUIREMENT PROPERLY COULD HAVE UNINTENDED FAR-REACHING CONSEQUENCES FOR OTHER PLATFORMS AND MEDIA.

The rule enunciated in the decision below diverges from established law in a way that could ultimately endanger a wide range of other platforms, particularly digital and web-based media. The Second Circuit's reasoning—that the designation of a private company to operate a public forum can be sufficient to render the company a state actor—logically applies to an array of other media operators, such as internet service and content providers. Indeed, such platforms are arguably "the electronic version of the public square," which the decision below treats as all but dispositive of the state action inquiry. Pet. App. 13a. The "state actor" requirement should not be used to treat private digital and web-based media platforms as governmental actors merely because the forum in which they operate appears to be public in nature. But the Second Circuit's decision opens the door to applying the state action doctrine in this way.

The Court should not lightly endorse a new constitutional test that could affect the ever-evolving world of web-based media:

> While we now . . . realiz[e] that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).

The risk of civil liability is not an abstract hypothetical for internet service and content providers. To the contrary, academic commentary and recent lawsuits have already raised the possibility of relaxing the "state actor" requirement as applied to internet service providers and social media platforms. Some commentators have proposed modifying the state actor requirement, along the lines of the decision below, such that private internet service providers and social media platforms could be treated as state actors for First Amendment purposes. *See, e.g.*, Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application—Or Lack Thereof—To Third-Party Platforms*, 32 Berkeley Tech. L.J. 989, 1022–26 (2018); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 Berkeley Tech. L.J. 1115, 1160–70 (2005).

Moreover, litigants have been emboldened in arguing that private owners and administrators of

online platforms, such as Google, YouTube, and Facebook, are state actors. So far, courts have rejected these arguments and held that private online service providers and social media platforms are not state actors for First Amendment purposes. *See, e.g., Prager Univ. v. Google LLC*, No. 17-cv-06064, 2018 WL 1471939, at *8 (N.D. Ca. Mar. 26, 2018) (dismissing Section 1983 claim against Google because it did not amount to state actor); *Shulman v. Facebook.com*, No. 17-cv-00764, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (rejecting arguments that Facebook is a state actor for constitutional purposes); *see also Howard v. Am. Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (rejecting argument that AOL should be deemed a state actor because it is a "quasi-public utility" that involves "a public trust").

Some courts, however, have used the public forum doctrine to hold that the First Amendment applies to specific "accounts" or "pages" on social media sites. *See, e.g., Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 565–75 (S.D.N.Y. 2018) (holding that a Twitter account operated by a public office constitutes a public forum); *Davison v. Plowman*, 247 F. Supp. 3d 767, 776 (E.D. Va. 2017) (holding that a Facebook page operated by a county attorney's office serves as a limited public forum). These decisions, when combined with the majority's diluted "state actor" requirement in public forums, raise the specter of potential liability for private owners of these sites.

Relaxing the "state actor" requirement could have serious unintended consequences for digital and web-based enterprises. In fact, it is difficult to believe these innovations would exist today had their crea-

tors thought constitutional liability was part of the bargain. Most of these platforms' business models are based on individualizing content so that users are presented with information useful and relevant to them, which necessarily entails restricting the flow of speech from a wide array of other speakers. *See* Kate Klonick, *The New Governors: The People, Rules and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1599 (2018) ("[W]hile it might appear that any internet user can publish freely and instantly online, many platforms actively curate the content posted by their users."). Introducing the risk of liability now will discourage present and future innovation in these marketplaces.

Regulation of content in these private spaces should be left to their owners rather than litigated under the auspices of the First Amendment. The private sector has already designed creative, market-based solutions to moderate content consistent with the wishes of their customers. *See* Klonick, *supra*, at 1635–48 (exploring the various facets of content moderation in social media). The imposition of constitutional liability would deprive private enterprises of the full right to choose how to participate in the marketplace of ideas. The Court should clarify that private actors risk such liability only where their speech and editorial decisions are subject to meaningful state control.

CONCLUSION

For the foregoing reasons, the Court should reject the Second Circuit's analysis and reaffirm that the "state actor" requirement for First Amendment lia-

bility necessitates meaningful state control over the decisions of the actor in question.

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Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, *et al.*,

Petitioners,

v.

DEEDEE HALLECK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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IN THE

Supreme Court of the United States

No. 17-1702

MANHATTAN COMMUNITY ACCESS CORPORATION, *et al.*,

Petitioners,

v.

DEEDEE HALLECK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTERESTS OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel contributed money to fund the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

more than three million businesses of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases raising issues of concern to the nation's business community.

This is one of those cases. Because businesses across industries open their private property up to speech by the public, the Chamber's members have an interest in ensuring the proper application of forum analysis and state action doctrine. If courts misapply those doctrines, private entities may suddenly face First Amendment liability and, from there, perhaps liability under other constitutional provisions as well. Thus, while the Chamber takes no position as to the ultimate disposition of this case, it has a strong interest in the governing rules of law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Businesses routinely open up their private property for speech by members of the public. That is obvious in the era of YouTube, Twitter, and SnapChat. But it is hardly new. Since long before the dawn of the internet, grocery stores have provided bulletin boards for community members to post announcements; cafes have offered open mic nights for customers to present their poetry or their music; and magazines and newspapers have sold or given away space to customers that wish to advertise a product or celebrate a marriage, to name just a few examples.

While these privately run spaces for public speech help stoke the "marketplace of ideas" that the First

Amendment protects, *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017), the businesses that administer them are not subject to constitutional scrutiny. The Constitution's plain text and decades of precedent dictate that the First Amendment has "no part to play" when a private company regulates speech in a space it opens to the public. *Hudgens* v. *NLRB*, 424 U.S. 507, 521 (1976). Thus, before analyzing an allegation that a defendant has violated the First Amendment by censoring speech in a space open to the public, a court must first ask whether the defendant is a state actor subject to the Constitution. If, and only if, the defendant qualifies as a state actor, then the court may apply First Amendment forum analysis to decide if a constitutional violation has occurred.

That much should be elementary: The First Amendment regulates government actors and protects private entities. But in the decision below, the Second Circuit subverted that simple dichotomy by reversing the steps in the standard constitutional inquiry. Confronted with an alleged First Amendment violation, the Court of Appeals began by applying forum analysis. Then, having decided that the speech arena in question resembled a public forum, the Second Circuit concluded that Petitioners must be state actors because they run the forum, and "facilities or locations deemed to be public forums are usually operated by governments." Pet. App. 14a.

That jump in logic demonstrates the vice in reversing the order of operations. Undertaking a forum analysis first might be harmless (albeit pointless) if a court went on to apply a proper state-action analysis; but allowing forum analysis to drive the state-action

determination would wreak havoc on the First Amendment. Businesses offering their private spaces for public speech would see their efforts to promote speech rewarded with First Amendment litigation. Internet sites like YouTube and Twitter would be affected, but so would the countless grocery stores, cafes, and magazines that have historically provided fora for speech.

Courts, in turn, would need to apply First Amendment doctrines designed for government actors to this wide range of private entities—an unworkable and counter-productive exercise given that the First Amendment *protects* private actors. The scrutinized businesses would see reputational and financial harms as they would be forced to facilitate speech they find objectionable and offensive in order to prevent First Amendment liability. And the public, too, would suffer because there would be fewer opportunities to consume and share speech, as companies closed or limited spaces for public speech to avoid litigation.

Nor would these costs come with a countervailing benefit: Unlike governments, markets have strong incentives to provide spaces for more perspectives and a wider array of speakers, as businesses can profit from appealing to all corners of the marketplace. If existing market participants do not permit minority views, they will face competition from new entrants who will. There is therefore no need to distort the First Amendment to cover private entities merely because they operate a space that resembles a public forum.

Further, this doctrinal distortion may spill over into state action doctrine as a whole, making highly regulated entities particularly vulnerable to constitutional liability. This Court has repeatedly held that regulation alone does not convert private parties into government actors, and that licensing and funding do not transform private actors into state representatives. But adopting the Second Circuit's lax approach with respect to entities that open up spaces for speech would blur the bright line rules currently in place, and it would harm a wide range of businesses that will find themselves newly susceptible to regulation by courts imposing constitutional liability.

To avoid these negative consequences for the doctrine, the companies, and the public as a whole, this Court should reiterate that courts must apply standard state action doctrine at the outset of a forum analysis case, limiting the First Amendment to its proper role in policing *government* attempts to control speech. To hold otherwise would permit the First Amendment to do exactly what it is supposed to prevent the government from doing—intruding on the speech and associational interests of private entities.

ARGUMENT

I. THE CONSTITUTIONAL RULES GOVERNING FORA APPLY ONLY TO STATE ACTORS.

A. The First Amendment Protects Private Entities, Including Those That Open Fora For Speech, from Government Regulation.

"It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens*, 424 U.S. at 513; *see also, e.g.*, *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 566 (1995) ("[T]he guarantee[ ] of free speech * * * guard[s] only against encroachment by the government and erect[s] no shield against merely private conduct" (internal quotation marks and alteration omitted)). The Framers adopted the First Amendment because they feared "silence coerced by law" and "the occasional tyrannies of governing majorities" that might be tempted to "discourage thought" through "fear of punishment." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269–271 (1964) (quoting *Whitney* v. *California*, 274 U.S. 357, 375–376 (1927) (Brandeis, J., concurring)). The First Amendment is designed to shield private speakers from these governmental intrusions. *Cf.* U.S. CONST. AMEND. I ("*Congress* shall make no law * * * abridging the freedom of speech" (emphasis added)).

The Framers therefore drafted the First Amendment to protect private entities, not to restrict them. For a company, as for an individual, the First Amendment guarantees the right to choose what to say, and how to say it. *Hurley*, 515 U.S. at 573-574.

And "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n of California*, 475 U.S. 1, 16–17 (1986) (plurality op.).

B. State Action Doctrine Preserves The First Amendment Rights Of Private Entities.

State action doctrine is one way that courts protect companies' rights to choose what they will and will not say. The same constitutional restrictions that promote free speech when they apply to the government may curb speech rights if they are applied to private entities by narrowing their ability to choose the speech that occurs within their own spaces. The state action doctrine generally prevents that harm by dictating that courts may not impose the First Amendment's restrictions on any private actor unless the "seemingly private" conduct at the heart of the suit "may be fairly treated as that of the State itself." *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal quotation marks omitted). By applying state action analysis in First Amendment suits, courts ensure that they do not impermissibly limit a private defendant's speech rights in the name of vindicating the plaintiff's.

That is a particular danger in the context of public forum analysis. Forum analysis is used in First Amendment cases to "assess[ ] restrictions that *the government* seeks to place on the use of its property." *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992) (emphasis added). Under this approach, a court subjects government restrictions on speech to strict scrutiny when the court deter-

mines that the government property in question is a "traditional public forum"—that is, a space "that has traditionally been available for public expression." *Id.* A court may apply a lower level of scrutiny if the property in question does not meet that description. *Id.*

Importantly, however, public forum analysis applies exclusively when the government regulates speech on government property. A space that might be deemed a public forum if it were operated by the government is not treated as such if it is owned and run by a private entity. *Hudgens*, 424 U.S. at 513–521. "[M]embers of the public" simply do not "have the same right of free speech" on private property "as they would have on the similar public facilities in the streets of a city or town." *Id.* at 519 (quoting *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 569 (1972)); *see also, Krishna*, 505 U.S. at 681 ("The practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport[,]" just as "[t]he development of privately owned parks that ban speech activity would not change the public fora status of publicly held parks.").

Indeed, the Constitution forecloses the application of forum analysis to private entities: Traditional public fora require content and viewpoint neutrality. *See, e.g.*, *Hudgens*, 424 U.S. at 520 (citing *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975)). If these neutrality requirements are applied to private entities that open spaces for public speech, companies will be deprived of their ability to monitor content shared in their privately owned spaces. That, in turn, will compel businesses to associate with and

even facilitate ideas and speakers they find objectionable. But, as this Court has recognized, a company's First Amendment rights are violated where it is forced "to be publicly identified or associated with another's message." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470–471 (1997); *see also Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (holding that editorial control is a constitutional right). Like all speakers, "business corporations generally" have a First Amendment right to choose whether "to propound a particular point of view." *Hurley*, 515 U.S. at 574-575.

To prevent a violation of that right, courts must be vigilant in applying state action analysis at the outset of any suit that involves allegations that a private entity has improperly regulated speech in a public forum.

C. The Second Circuit Erred In Holding That Operating A Public Forum Generally Constitutes State Action.

In the decision below, the Second Circuit got things exactly backwards. Although Manhattan Community Access Corporation is nominally a private entity, the court did not begin by assessing whether Petitioners' conduct could "be fairly treated as that of the State itself." *Brentwood*, 531 U.S. at 295 (internal quotation marks omitted). Instead, it first decided that public access channels are traditional public fora because a public access channel resembles an "electronic version of the public square." Pet. App. 13a. Only then did the Second Circuit turn to the state action question, summarily concluding that Petitioners' activity must be a state action *because* Petitioners operate a public forum and "facilities or

locations deemed to be public forums are usually operated by governments." *Id.* 14a.

This analysis went wrong at every turn. By starting with the public forum inquiry, the court ignored the antecedent state-action question. *Brentwood*, 531 U.S. at 295. And, by assuming that operating a public forum qualifies as state action, the Second Circuit ignored this Court's precedent dictating that a private entity is not subject to constitutional scrutiny merely because it runs a space that is "similar" to a traditional public forum. *Hudgens*, 424 U.S. at 519.

In support of its confused approach, the Second Circuit relied almost exclusively on Justice Kennedy's concurrence—expressly disavowed by a majority of the justices—in *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996) (plurality op.). But even if such reliance were appropriate, Justice Kennedy's opinion does not come close to supporting the proposition that an entity may be deemed a state actor merely because it operates a space that resembles a public forum.

The state action in *Denver Area* was obvious. Plaintiffs were challenging *Congress's* regulation of public access channels. *Id.* at 732. Even then, Justice Kennedy took care to note not only that there was a congressional statute at stake, but also that the cable channels were "public fora *created by local or state governments*." *Id.* at 792–794 (Kennedy, J., concurring) (emphasis added). In other words, Justice Kennedy found state action both in the regulation and the creation of the relevant space. Moreover, despite this state involvement, several justices would have held that public access channels

are *not* public fora because "[t]he public forum doctrine is a rule governing claims of a right of access to public property, and has never been thought to extend beyond property generally understood to belong to the government." *Id.* at 827 (Thomas, J., concurring in the judgment in part and dissenting in part) (internal quotation marks and citation omitted).

There is therefore *no* precedent permitting a court to assume that state action is involved merely because a space resembles a traditional public forum.

II. APPLYING FORUM ANALYSIS TO PRIVATE ENTITIES DISTORTS FIRST AMENDMENT DOCTRINE AND THREATENS HARM TO BUSINESSES AND THE PUBLIC.

If operating a space that resembles a traditional public forum were sufficient to establish state action, a vast array of private companies would be subject to First Amendment scrutiny for routine conduct. Internet companies that operate social-media platforms such as YouTube, Instagram, and Facebook would obviously be vulnerable, as those websites are frequently described as the modern day equivalent of the town square. *See, e.g.*, *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1737 (2017) (describing "social networking sites * * * like Facebook, LinkedIn, and Twitter" as "the modern public square"); *Coal. for Secular Gov't* v. *Gessler*, 71 F. Supp. 3d 1176, 1182 (D. Colo. 2014) ("[T]he internet is the new soapbox; it is the new town square."). But the implications of the Second Circuit's analysis would not end there.

This Court has found that a wide variety of speech arenas operated by government entities may be dubbed public fora. For example, the Court has held that state university meeting facilities, municipal theaters, and school board meetings all constitute public fora of one kind or another. *See Widmar* v. *Vincent*, 454 U.S. 263 (1981); *City of Madison Joint Sch. Dist.* v. *Wisconsin Emp't Relations Comm'n*, 429 U.S. 167 (1976); *Se. Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). Private companies, too, operate meeting facilities and theaters and hold community gatherings. If this Court were to endorse the Second Circuit's approach, any one of these activities would suddenly subject a private company to First Amendment scrutiny.

The results would be devastating for First Amendment doctrine, private businesses, and the public as a whole.

A. First Amendment Doctrine Is Ill-Suited For Application To Private Entities.

This Court has already confronted multiple questions regarding how forum analysis applies to entities that are obviously governmental. *See, e.g.*, *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) (evaluating whether specialty license plates are a public forum); *Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of the Law* v. *Martinez*, 561 U.S. 661, 683 (2010) (applying public forum analysis to recognized student group policies at a public law school); *Krishna*, 505 U.S. at 680 (evaluating whether "airport terminals are public fora"). Those questions would only multiply if courts attempt to apply the doctrine to private entities. How, for example, does

one determine whether YouTube or Instagram more closely resembles a traditional public forum or a limited public forum when the government has never been involved with video or picture sharing sites *at all*?

Even if courts are able to wade through this inevitable morass, they would still face profound difficulties in applying First Amendment means-end scrutiny. When the government is the defendant, courts may apply the standard First Amendment balancing tests to ask whether there is a sufficiently important "*governmental* interest" justifying the speech restriction at stake. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted). But how would a district court determine whether there is a significant *government* interest in regulating the speech at issue when the restrictions in question are not the government's? And what basis would a court have to insist that a private company run its business in accordance with an interest of the government? That would stand the First Amendment on its head by conscripting private actors for speech purposes.

Nor may courts avoid these difficulties by analyzing the strength of the *corporate* interest involved, rather than the governmental interest. The current tests insist on a significant *government* interest for good reason: The First Amendment addresses the government. Fashioning a new balancing test to incorporate some kind of compelling private-interest test would stray from the text and history of the amendment. It would also be a practical nightmare. Courts are ill equipped to scrutinize business interests or to make the necessarily subjective determina-

tion as to whether a particular company action best furthers the company's goals. *See, e.g.*, *United Copper Sec. Co.* v. *Amalgamated Copper Co.*, 244 U.S. 261, 263–264 (1917) (explaining that "business questions" are "left to the discretion of the directors" and courts "seldom" interfere with those decisions absent misconduct or a conflict of interest); *see also Auerbach* v. *Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979) ("[C]ourts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. * * * [B]y definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility.").

This Court should not adopt a rule forcing lower courts down this uncharted road. The poor fit between First Amendment jurisprudence and corporate actors confirms that the First Amendment does not limit them.

B. The Policy Consequences Will Be Equally Severe.

Applying forum analysis to private companies that open up spaces to public speech would also have a raft of harmful policy consequences. It would hurt companies by forcing them to align with views that they or their customers find objectionable. And it would hurt the public by providing fewer opportunities for speech, not more.

1. *Subjecting companies to First Amendment scrutiny will inflict financial and reputational costs on affected businesses.*

Subjecting private companies to public forum analysis and the resulting First Amendment liability

would unfairly restrict their ability to control the spaces they own and operate. As noted, it would force companies to adhere to neutrality requirements that would violate the companies' own First Amendment rights. *See* pp. 7-9, *supra*. But the problems do not stop there.

Imposing a neutrality requirement would give users and courts, not companies, final say over what occurs in the company's space. That is flatly inconsistent with business owners' property rights that "must be respected and protected" alongside First Amendment freedoms. *Lloyd*, 407 U.S. at 570; *see also Hudgens*, 424 U.S. at 517 (explaining that prohibiting a private shopping mall from excluding picketers would allow "the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it" (internal quotation marks omitted)).

Moreover, it would be deeply unfair to force companies to associate with views to which they object because that forced association could lead to financial and reputational harms. For example, a company that has built a reputation on civility and decency may be forced to allow users to post vulgar or offensive content. A business catering to all ages may be required to permit user content unsuitable for young viewers. And, more generally, any company might be forced to host material that undermines its mission or values, or even directly insults the company itself.

The compelled association with these objectionable views will drive off customers and decrease revenues. More subtly, the forced association with objectionable material may alter the host company's reputa-

tion, a particularly grave result given that companies rely on their reputations to draw in new customers and retain old ones. *See, e.g.*, DELOITTE, GLOBAL SURVEY ON REPUTATION RISK 2 (2014), *available at* https://tinyurl.com/ya5d3c5b (stating that more than twenty-five percent of a company's market value can be attributed to its reputation). Loyal customers who chose a company because of its values will take their business elsewhere when they see those values impugned by material in a company-sponsored space. That may tarnish brands, depress revenue, and, for publicly traded companies, lower stock prices. *See id.* at 7, 12. In short, companies' reputations—and in turn their bottom lines—will suffer if they are forced to put their weight behind all speakers, regardless of their viewpoint.

2. Applying forum analysis to private companies will lead to fewer outlets for speech.

Because of these potential reputational and financial harms entailed by constitutional liability, subjecting companies to forum analysis will also make businesses hesitant to operate spaces for speech that may be comparable to traditional public fora. That hesitance will ultimately lead to "less speech, not more." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 680 (1998).

Many companies will stop operating fora where users post content if they cannot retain some control over what appears on them. Likewise, businesses will shrink from opening new fora for sharing content because of the costs associated with potential First Amendment challenges. Ultimately, this will lead to fewer privately sponsored fora for speech. *See id.* at 681 ("Were it faced with * * * cacophony on

the one hand, and First Amendment liability, on the other," a company may decide that "the safe course is to avoid controversy, and by so doing diminish the free flow of information and ideas." (internal quotation marks and ellipses omitted)). And the chilling effect will harm more than just the internet. Grocery stores may take down their announcement boards, cafes may cancel their open mic nights, and corporations may cancel community meetings if they fear that these activities will expose them to First Amendment litigation. These results cannot possibly serve "the marketplace of ideas" the First Amendment is designed to protect. *Tam*, 137 S. Ct. at 1766.

3. Inflicting these harms is unnecessary because market forces will lead to more openness by themselves.

No policy imperative justifies the harms that arise from extending First Amendment liability to private entities. To the contrary, important differences between public and private actors make it appropriate to apply First Amendment scrutiny only to the former.

Public officials have incentives to squash speech, particularly critical speech, in order to entrench their own political power, and—unlike private actors—they may use coercive power to accomplish that end. *See, e.g.*, Richard Klein, *The Empire Strikes Back: Britain's Use of the Law to Suppress Political Dissent in Hong Kong*, 15 B.U. INT'L L.J. 1 (1997). By contrast, private companies—particularly those that run internet sites—have market incentives to, at least collectively, provide fora for multiple viewpoints. Creating an expansive library of content will often increase a company's customer base and improve a

company's economic wellbeing. For example, a website that has a wide range of content appealing to a variety of viewers will typically enjoy a larger market share and, in turn, a higher potential to profit from selling advertisements. *See, e.g.*, Robert D. Buzzell et al., *Market Share—a Key to Profitability*, HARV. BUS. REV., Jan. 1975; Masoud Nosrati et al., *Internet Marketing or Modern Advertising! How?*, 2 INT'L J. ECON. MGM'T & SOC. SCIS. 56, 56 (2013) ("Most web sites, with the exception of transaction ones such as eBay, generate the preponderance of their revenues from the sale of advertising inventory * * * ."); INTERNET ADVERTISING BUREAU, IAB INTERNET ADVERTISING REVENUE REPORT, FULL YEAR 2017 AND Q4 2017, at 5 (May 10, 2018), *available at* https://tinyurl.com/yc2zhhur (noting that digital ad revenue increased by 21 percent to $88 billion in 2017). At the same time, companies that do not permit content from certain types of viewers will soon get competition from other websites that will cater to those who have been excluded.

In other words, the market will often do precisely what the First Amendment must accomplish with respect to state actors: It will prompt companies to open spaces that welcome a broad range of views, while encouraging new businesses to open fora for speakers that may previously have been silenced. Accordingly, there is no reason for this Court to rewrite the First Amendment to make it apply to private entities.

III. THE SECOND CIRCUIT'S APPROACH ALSO DISTORTS STATE ACTION DOCTRINE.

Time and again, the Court has rejected claims that a single characteristic—such as regulation or government funding—might be sufficient to make a private entity a state actor. But if this Court were to hold that the standard is satisfied when a private entity operates a public forum, it would significantly lower the bar for establishing state action. The consequences would be severe.

A. This Court Applies A Stringent State Action Standard.

While this Court has applied various tests to assess whether a particular case involves state action, it has consistently emphasized that it is a high bar. The state action requirement vindicates the text of the Constitution, which is directed only to the government, not private entities. It also "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Thus, applying a stringent state action requirement "ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts." *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 52 (1999).

For these reasons, this Court has been reticent to find that a private entity's conduct may be attributed to the government. It is not enough, for example, that a state law permits a private actor to take some action. Thus, "a State's mere acquiescence in a private action" does not "convert[] that action into that of the State." *Flagg Bros.* v. *Brooks*, 436 U.S.

149, 164 (1978). Nor do most other forms of regulation convert a private entity into a state actor. *See Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 350 (1974). Rather, the presence of state or federal regulations is only relevant where the regulations actually "compel" the complained-of act. *Flagg Bros.*, 436 U.S. at 165–166; *see also Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841–842 (1982) (finding no state action where challenged actions "were not compelled or even influenced by any state regulation"); *Blum* v. *Yaretsky*, 457 U.S. 991, 1004, 1010 (1982) ("[C]onstitutional standards [can be] invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains," which requires that the State have "dictate[d] the decision" at issue.); *Denver Area*, 518 U.S. at 737 (plurality op.) (the First Amendment "ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so ordinarily even where those decisions take place within the framework of a regulatory regime" (emphasis omitted)). And in those situations, this Court has never suggested that a company may be liable for doing what regulations coerce but has only suggested that such regulations may be enjoined.

Thus, even "extensive state regulation" does not make a business a state actor. *Sullivan*, 526 U.S. at 52; *see also Blum*, 457 U.S. at 1004 (just because a business is "extensively regulated" does not make it a state actor); *Jackson*, 419 U.S. at 350 ("[T]he fact that the regulation is extensive and detailed, as in the case of most public utilities," does not "convert" a business's "action into that of the State."). Indeed, in *Sullivan*, *Blum*, and *Jackson*, this Court declined to

find state action in the highly regulated industries of workers compensation insurance, Medicaid-funded nursing homes, and public utilities, respectively.

By the same token, special, or even exclusive, dispensations from the government do not necessarily create state action, either. For instance, having one of a limited number of liquor licenses does not make a business a state actor. *See Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 177 (1972). Similarly, that Congress granted the right to use a particular trademark did not make the U.S. Olympic Committee a state actor. *See San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522, 543–544 (1987). And even when the government confers "monopoly status" on a business, that is not "determinative in considering whether" its contested act "was 'state action.'" *Jackson*, 419 U.S. at 351-352.

The same logic necessarily applies to businesses allocated bandwidth from the FCC for such uses as radio or television broadcasting, or for phone and internet mobile service—whether such an allocation is characterized as a grant of a monopoly over particular frequencies or receipt of one of a limited number of licenses. Indeed, this Court has recognized that such license-holders—far from being state actors—in fact enjoy a level of First Amendment protection *against* the government for their content decisions. *See, e.g., Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 636–637 (1994). Put simply, being acted upon by the state does not make one a state actor.

Nor does public money or subsidy transform private businesses into state actors. "That programs undertaken by the State result in substantial fund-

ing of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business." *Blum*, 457 U.S. at 1011; *see also San Francisco Arts*, 483 U.S. at 544 ("The Government may subsidize private entities without assuming constitutional responsibility for their actions."); *Rendell-Baker*, 457 U.S. at 841 ("[P]rivate contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.").

Finally, and perhaps most relevantly, a private company is not a state actor simply because it undertakes some task that serves the public or that is also undertaken by government entities. Rather, performing a public function triggers a finding of state action only when "the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-Baker*, 457 U.S. at 842 (quoting *Jackson*, 419 U.S. at 353); *see also, e.g.*, *Jackson*, 419 U.S. at 354 ("Doctors, optometrists, lawyers," and others "are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest,'" but "such a status [does not] convert[] their every action, absent more, into that of the State."); *Marie* v. *Am. Red Cross*, 771 F.3d 344, 364 (6th Cir. 2014) (rejecting assertion that the Red Cross is a state actor, even though it is a congressionally chartered entity that serves the public in myriad ways). This bar is so high that the Court's precedent provides but a single example of an instance where a private entity engaging in private activity meets that test: when it runs a company town. *Marsh* v. *Alabama*, 326 U.S. 501 (1946). And when the Court briefly

suggested that the public function test might apply more broadly in *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), it resoundingly repudiated that proposition only a few years later, *Hudgens*, 424 U.S. at 521.

This Court has therefore made clear that private entities rarely qualify as state actors. Any relaxation of this Court's high standard would upend decades of precedent.

B. The Second Circuit's Approach Lowers The Bar And Threatens Dire Results.

Finding state action merely because an entity hosts a space for public speech conflicts with this case law. While very few private entities qualify as state actors under this Court's tests, the Second Circuit's approach casts a much broader net.

If this Court blesses such an approach, it will sow serious doctrinal confusion. Courts will be uncertain as to how stringently they should apply the state action inquiry, and regulated parties will face blurry lines rather than a clear rule. If the specter of constitutional liability hangs over businesses due to a loosened state-action doctrine, they may feel compelled to act as if their conduct *will* be treated as state action. In that way, the "area of individual freedom" the strict state-action doctrine is supposed to assure, *Lugar*, 457 U.S. at 936, will be eviscerated.

What is more, the doctrinal contagion may spread, and courts may react to the loosening of the standard in the context of public forum analysis by lowering the state action bar in general. Courts might, for example, begin to treat private entities as state actors because they are part of a highly regulated industry, or based on some other such forbidden

consideration. The result will impose severe burdens on the First Amendment rights of private companies, as they are increasingly forced to associate with speech they oppose. *See Pac. Gas & Elec. Co.*, 475 U.S. at 15. And it may also lead to absurd results in other First Amendment contexts: If a teacher's "rights to freedom of speech or expression" are not shed "at the schoolhouse gate," would the same rule apply to an employee's rights at the office door of a highly regulated company? *See Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Would an oil company operating on public lands be unable to take action against a company executive who moonlights as an anti-fossil-fuel activist on cable news? Or would a private vaccine clinic that receives Medicaid funding be forced to employ a nurse who distributes anti-vaccination literature at the entrance the moment he goes off the clock? This Court should not test these questions by permitting lower courts to infer state action too broadly.

The potential problems go beyond the First Amendment. Under a loosened state action doctrine, would the Second Amendment require utility companies to allow their employees to carry firearms in the office? Would the Fourth Amendment stop investment banks from reading employee emails to catch insider trading? And would nursing homes and private schools face constitutional due process lawsuits when they make major administrative decisions, as was asserted in *Blum* and *Rendell-Baker*? If the answer to some or all of these questions is yes, then the Constitution will transform into a comprehensive scheme of business regulation.

The Framers and Congress never intended such absurd results when enacting the Bill of Rights or 42 U.S.C. § 1983. No matter how this Court rules in this case, it should follow decades of precedent and maintain the high bar for treating private businesses as state actors.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be vacated.

Respectfully submitted,

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No. 17-1702

In the
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION; DANIEL COUGHLIN; JEANETTE SANTIAGO; CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK; JESUS PAPOLETO MELENDEZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS CURIAE* CHICAGO ACCESS CORPORATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amicus Chicago Access Corporation (CAC) is a local, community-based 501(c)(3) private foundation tasked with managing public-access television channels in Chicago, Illinois. CAC owns and operates Chicago Access Network Television (CAN TV), which was established 35 years ago to provide ordinary, work-a-day Chicagoans with an otherwise unattainable digital media platform to engage with their community. CAC is a non-governmental, non-commercial, non-tax-supported foundation that seeks to promote and develop maximum public awareness of, usage of, and involvement in television for educational, cultural, civic, health, social service, and other non-profit purposes. To that end, CAC provides technical training, video equipment, studio facilities, television program channel time, and online hosting of unique non-commercial video content not typically accessible through commercial mass media outlets. CAC submits this *amicus* brief because the decision below is divorced from the realities of public-access television and threatens the viability of CAC and public-access channel operators across the country.

SUMMARY OF ARGUMENT

A defendant cannot be held liable under §1983 unless it deprived the plaintiff of federal rights while acting "under color of state law." This "under color of

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

state law" element is not satisfied unless *two* separate requirements are met, not just the one requirement addressed in the decision below.

The first requirement, which has received little discussion in this case, is that the claimed deprivation must result from an action with its *source in state authority*—for example, when the defendant exercises rights conferred by a state statute. The second requirement, which the parties refer to as the "state action" requirement, is that the defendant be a person who may fairly be said to be a "state actor." CAC agrees with petitioners that this case does not satisfy the second requirement, as none of this Court's "state actor" tests are satisfied. But this case even more clearly does not satisfy the *first* requirement. Specifically, respondents do not allege that MNN was exercising state-conferred authority when it took the actions challenged in this case; to the contrary, respondents allege that MNN acted *in violation of* state law by refusing to air their program on a first-come, first-served basis. Respondents' remedy is thus not under §1983, but under state law.

If this Court chooses to address whether MNN's public-access channels are public forums (in the constitutional sense), it should hold that they are not because they are private property in which the government holds no formal interest. The public-forum doctrine is a rule that governs claims of a right of access to *public* property. Indeed, every single one of this Court's public forum cases has involved property in which the government has held at least some property interest; it is that property interest that the government has designated as a public forum.

Here, respondents have not alleged that the government holds any property interest in MNN's public-access channels. Accordingly, the government cannot designate MNN's public-access channels public forums.

To be clear, CAC is steadfastly committed to fostering and supporting freedom of speech and freedom of expression, and does not have a policy of censoring the content of its producers. CAC's participation in this case is not driven by any desire to restrict content or restrain speech. Indeed, CAC's *raison d'être* is to provide a forum for Chicagoans to freely express their thoughts and ideas. But none of that means that CAC exercises state authority or that CAC is a state actor. To the contrary, CAC is a non-governmental, not-for-profit corporation that receives *no* State funding, has *no* State officials on its Board, and exercises *no* State power. Likewise, none of that means that CAC's channels should be subject to the same strict constitutional standards that apply on public streets and in public parks. The decision below is divorced from the realities of public-access television and would impose unwarranted and counterproductive burdens on public-access operators.

ARGUMENT

I. Respondents Do Not Satisfy Either Part Of The Two-Part Test For Determining Whether Action Is Taken "Under Color Of State Law."

CAC agrees with petitioners that the Second Circuit erred by failing to apply any of this Court's tests for determining whether MNN, a private non-profit entity, may be characterized as a "state actor."

And CAC further agrees with petitioners that MNN is not a "state actor" under any of the tests this Court has previously applied, including the "exclusive public function" test on which respondents rely. Petr.Br.38-55; *see infra* Part I.C. Before addressing that issue, however, it is important to recall that there is *another* threshold element to the *two*-part test for determining whether a challenged action was taken "under color of" state law. 42 U.S.C. §1983. As this case illustrates, lower courts have had an unfortunate tendency to ignore that prong altogether, even when, as here, it provides a straightforward ground on which to resolve a case.

A. Section 1983 Establishes a Two-Part Test for Determining Whether Action Was Taken "Under Color of State Law."

A defendant does not violate 42 U.S.C. §1983 unless the conduct that allegedly deprived the plaintiff of a federal right was taken "under color of any statute, ordinance, regulation, custom, or usage, of any State." As shorthand, courts often say that this element is satisfied when the challenged action was taken "under color of state law" or if it was "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). While courts (including the court below) commonly suggest or hold that conduct is "fairly attributable to the State" whenever one of this Court's various "state action" tests is satisfied, *see, e.g.*, Pet.App.9, 45, those "state action" tests are pertinent only to the *second* part of what is in fact a *two*-part test.

This Court's cases "reflect a two-part approach to this question of 'fair attribution.'" *Lugar*, 457 U.S. at

937. The first requirement is that "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.* at 939. The second requirement, which the parties refer to as the "state action" requirement, is that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937; *accord Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); *Georgia v. McCollum*, 505 U.S. 42, 51 (1992); *Wyatt v. Cole*, 504 U.S. 158, 162 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

These two requirements are "related," but "not the same." *Lugar*, 457 U.S. at 937. The two requirements "collapse into each other" when the defendant is a state official (*e.g.*, a police officer), but they "diverge" where, as here, the defendant is a "private party." *Id.* The first requirement focuses on the *source of authority* for the challenged conduct, while the second requirement focuses on the *identity* of the actor. A comparison of this Court's cases makes the distinction clear.

The first requirement was dispositive in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). There, defendant Moose Lodge refused to serve a beverage to the plaintiff because he was black. *Id.* at 164-65. The plaintiff filed suit under 42 U.S.C. §1983, alleging that "the refusal of service to him was 'state action'" because "the Pennsylvania liquor board had issued appellant Moose Lodge a private club license that authorized the sale of alcoholic beverages on its premises." *Id.* at 165. This Court disagreed, holding that Moose Lodge could not be held liable under §1983

because its "decision to discriminate could not be ascribed to any governmental decision." *Lugar*, 457 U.S. at 938 (discussing *Moose Lodge*). While the government's decision to authorize Moose Lodge's sale of alcoholic beverages played a causal role in some attenuated sense, that governmental decision was, for purposes of §1983, "unconnected with [the] discriminatory policies" that caused the plaintiff's injury. *Id.* Thus, the State was not the source of authority under which Moose Lodge applied its discriminatory policy.[2]

In contrast, the second requirement was dispositive in *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978). There, after the plaintiff was evicted from her apartment, she agreed to have her possessions sent to a warehouse owned by defendant Flagg Brothers. *Id.* at 153. When she failed to pay for the cost of storage, Flagg Brothers threatened to invoke a New York statute that permitted it to sell her property to recover the amount due. *Id.* The plaintiff filed suit under §1983, arguing that such a sale would violate her due process and equal protection rights. *Id.* The first requirement was satisfied because Flagg Brothers was

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[2] *See also Blum v. Yaretsky*, 457 U.S. 991, 1008-09 (1982) (doctors' decisions to transfer Medicare patients did not have source in state law because they were "medical judgments" not "dictated by any rule of conduct imposed by the State"); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (private school's decisions to fire counselor and teachers "were not compelled or even influenced by any state regulation"); *Polk Cty. v. Dodson*, 454 U.S. 312, 320-25 (1981) (public defender's decision to withdraw from case did not have source in state law because she acted according to the canons of professional ethics in a role adversarial to the State, and thus was "free of state control").

acting pursuant to a state statute that specifically permitted the threatened sale; the State thus was the source of Flagg Brothers' authority to act. *Id.* But this Court held that Flagg Brothers could not be held liable under §1983 because the lawsuit did not satisfy the second requirement—*i.e.*, because there was a "total absence of overt official involvement." *Id.* at 157. The Court applied the "exclusive public function" test and the "compulsion" test, *see* Petr.Br.41-48, and concluded that Flagg Brothers could not be treated as a state actor under either test. *Flagg Bros.*, 436 U.S. at 157-66.

This Court's decision in *Lugar* further clarifies the two-part test. In *Lugar*, the defendant (Edmonson Oil Co.) sued on the plaintiff's debt and, through an *ex parte* procedure permitted by state law, obtained prejudgment attachment of the plaintiff's property. 457 U.S. at 924-25. The plaintiff sued under §1983, alleging that Edmonson acted jointly with the State to deprive him of his property without due process of law. *Id.* at 925. The plaintiff's complaint alleged two counts that are relevant here: Count Two alleged that Edmonson violated his due process rights by *misusing* the state-law attachment procedure; Count One alleged that the state-law attachment procedure itself, even if followed, was constitutionally defective. *Id.* at 940-41.

Count Two, premised on the defendant's alleged *misuse* of the state law, did not satisfy the *first* part of the two-part test because the challenged conduct did not have a "source in state authority." *Id.* at 939-40. If, as alleged, Edmonson *misused* the state-law procedure and thus *violated* state law, Edmonson's

conduct "could not be ascribed to any governmental decision; rather, [Edmonson was] acting contrary to the relevant policy articulated by the State." *Id.* at 940. In other words, the plaintiff pleaded himself out of court on that claim: The allegation that Edmonson "invoked the statute without the grounds to do so" meant that Edmonson's conduct "could in no way be attributed to a state rule or a state decision." *Id.* Accordingly, that count did "not state a cause of action under §1983 but challenges only private action." *Id.*

In so holding, this Court distinguished the rule that a *state official* (*e.g.*, a police officer) acts under color of state law even when he abuses or misuses his authority. *Id.* at 940. When it comes to state officials, this Court long ago established that the Fourteenth Amendment's protections apply when "an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the [Fourteenth] Amendment." *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913); *see also United States v. Classic*, 313 U.S. 299, 326 (1941). As the Court noted at the time, however, that rule applies only where the defendant is a state "officer" exercising "the authority with which he is clothed." *Home Tel.*, 227 U.S. at 287. The rule does not apply when the defendant is a private entity that is not and never held itself out to be clothed with state authority. Thus, the Court in *Lugar* explained that "this case does not fall within the abuse of authority doctrine" because Edmonson did not "have the authority of state officials to put the weight of the State behind their private decision." 457 U.S. at 940; *see Collins v. Womancare*, 878 F.2d 1145, 1152 (9th Cir. 1989) ("[T]his 'abuse of

authority' doctrine does not apply if the challenged action is one undertaken by a *private party* rather than a state official.").

On the other hand, Count One—which was a challenge to the constitutionality of the state law itself—satisfied both parts of the test under §1983. Whereas the "private misuse of a state statute" alleged in Count Two could not "be attributed to the State," Count One challenged the statute itself, and "the procedural scheme created by the statute obviously is the product of state action." *Lugar*, 457 U.S. at 941. Accordingly, action taken pursuant to the statute "properly may be addressed in a §1983 action, if the second element of the state-action requirement is met as well." *Id.* The Court then applied the "joint participation" test, *see* Petr.Br.48-50, and concluded that the County Sheriff's participation in effectuating the attachment and seizure was sufficient to satisfy that second element of the test. *Lugar*, 457 U.S. at 941-42.

B. Respondents Have Not Alleged Any Action Attributable to State Law.

Respondents in this case cannot satisfy the first part of the two-part test set out in *Lugar*. They do not allege that the deprivation of their rights "resulted from the exercise of a right or privilege having its source in state authority." *Lugar*, 457 U.S. at 939. To the contrary, like the plaintiff in *Lugar*, they allege that petitioners *violated* state law. Their allegation that MNN acted contrary to state law means that, by their own telling, MNN's conduct can "in no way be attributed to a state rule or a state decision." *Id.* at 940.

As respondents stated in their brief in opposition, "State law ... prohibits public access channels from exercising editorial control." BIO.1; *see* BIO.8 ("[T]he City obligates MNN to adhere to the state-law requirement that it run noncommercial content ... on a 'first-come, first-served' basis."). The crux of respondents' complaint is that MNN violated those state laws by exercising editorial control over their content and refusing to air their programs on a first-come, first-served basis. *See, e.g.*, JA-39. "To say this, however, is to say that the conduct of which [they] complained could not be ascribed to any governmental decision; rather, [MNN was] acting contrary to the relevant policy articulated by the State." *Lugar*, 457 U.S. at 940. If, as respondents allege, MNN acted contrary to state law by exercising editorial control, then MNN's conduct "could in no way be attributed to a state rule or a state decision." *Id.* Accordingly, and regardless of whether any of the various "state action" tests discussed below is satisfied, respondents' complaint does "not state a cause of action under §1983." *Id.*

Respondents cannot solve this problem by pointing out that the City "delegated administration of the public access channels to petitioner MNN." BIO.7. That conclusion follows directly from *Moose Lodge*. In *Moose Lodge*, as noted, the State authorized Moose Lodge to sell alcoholic beverages; thus, without State involvement, Moose Lodge could not have discriminated against the plaintiff by refusing to serve him alcohol. 407 U.S. at 175-77. That attenuated connection, however, was not enough to ascribe Moose Lodge's decision to discriminate to the State. *Id.*; *see also Lugar*, 457 U.S. at 937-38; *Blum*, 457 U.S. at 1004

("Mere approval of or acquiescence in the initiatives of a private party is not sufficient."). Just so here. The fact that the City delegated administration of public-access channels to MNN 27 years ago does not mean that everything MNN has done since can be attributed to the State. That is especially true where, as alleged here, respondent maintains that the State does not merely acquiesce in the challenged conduct, but actually *prohibits* it. Respondents' allegation that MNN acted contrary to state law "does not describe conduct that can be attributed to the state." *Lugar*, 457 U.S. at 941.

This does not mean that respondents do not have a remedy—it just means that they do not have a remedy in federal court under §1983. And given that the crux of their complaint is that MNN violated state law, the remedy respondents do have is in the exact place it should be: under state law. *See* Petr.Br.59-60; *see Flagg Bros.*, 436 U.S. at 176-77 (Stevens, J., dissenting) ("If there should be a deviation from the state statute—such as a failure to give the notice required by the state law—the defect could be remedied by a state court and there would be no occasion for §1983 relief."). In particular, the New York State Public Service Commission ("PSC"), "as the agency charged with enforcing the rules regarding public access channels, has a procedure in place for complaints and is clothed with adequate investigatory powers to ensure compliance with the pertinent rules." *Ass'n of Cable Access Producers v. Pub. Serv. Comm'n*, 1 A.D.3d 761, 763-64 (N.Y. App. Div. 2003). In short, respondents may seek relief from the PSC for any alleged violation of the first-come, first-served policy.

Directing respondents and similarly aggrieved parties to state and local remedies also ensures that disputes will be resolved in the appropriate forum. Where, as here, a plaintiff believes that a public-access channel has violated the applicable regulatory requirements, the plaintiff may seek a remedy with the body (like the PSC here) that has subject-matter expertise and procedures well-suited for such disputes. If, however, a plaintiff believes that the state laws themselves are unconstitutional—*e.g.*, if a state law required public-access channels to "block[] 'patently offensive' sex-related material," *Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 753 (1996)—the plaintiff can seek relief directly against the state under §1983.

C. MNN Is Not a State Actor.

Respondents also do not satisfy the second part of the *Lugar* test, as MNN may not "fairly be said to be a state actor." 457 U.S. at 937. As petitioners explain, this Court has analyzed whether a defendant is a state actor by applying an "exclusive public function" test, a "compulsion" test, a "joint action" test, and an "entwinement" test, among other formulations. Petr.Br.38-55. In the decision below, however, the Second Circuit did not apply any of those tests. Instead, it asked whether MNN's public-access channels *would* be a public forum *if* MNN was acting "under color of state law," and then bootstrapped its (incorrect) answer to that question into an (incorrect) answer to the state-actor question. Neither that reasoning nor the result it produced can be reconciled with this Court's precedents.

The Second Circuit began by enumerating the various state-actor tests, Pet.App.9, but instead of applying any of these tests, it turned immediately to the forum question. Indeed, the very next sentence (and next eight paragraphs of analysis) were about "whether the public access channels in the pending appeal are public forums." Pet.App.10-14. Then, after focusing principally on the extent to which they are held open to the public for use, the court concluded that public-access channels are public forums because "[a] public access channel is the electronic version of the public square." Pet.App.13.

The court did not return to the state-actor question until after it had decided that public-access channels are public forums. And when it did so, it *still* did not apply any of this Court's state-actor tests. Instead, it treated the public-forum holding as all but dispositive of the state-action question. In the court's view, because "locations deemed to be public forums are usually operated by governments," MNN must be a state actor. Pet.App.14. To be clear, the court did not apply the "exclusive public function" test, the "compulsion" test, the "joint action" test, or any other test this Court has endorsed. Instead, it concluded that anyone who operates a forum that, if operated by the government, would be a "public forum," is *ipso facto* a state actor, provided there is at least some ostensible connection between the actor and the government—even when that connection is not enough to satisfy any of the "state actor" tests this Court has endorsed. *See* Pet.App.23-26 (Jacobs, J., dissenting in part).

Respondents implausibly read the Second Circuit majority as applying the "exclusive public function" test. BIO.22 ("[T]his was a public-function analysis."). Judge Lohier, in his concurrence, expressly disagreed with that characterization of the majority opinion that he joined; he noted that the majority "might *also* rely on the public function test to conclude that MNN and its employees are state actors," not that it had actually done so. Pet.App.19 (emphasis added). But in all events, the "exclusive public function" test, if applied correctly, is no help to respondents.

Respondents, like the decision below, would begin the analysis with the public-forum question, asking whether public-access channels *would be* a public forum *if* they were operated by the government. Respondents (unsurprisingly) would answer that question affirmatively, and would then plug that answer into the "exclusive public function" test. In other words, they would conclude that public-access channels *would be* a public forum *if* they were operated by the government, and then would reason that MNN must be a state actor because the "regulation of a public forum is a public function." BIO.21.

That circular reasoning mistakenly assumes that it is the nature of the forum, not the nature of the party operating it, that determines whether the First Amendment applies. The First Amendment does not protect "public forums" in the abstract; it protects "public forums" when they are *run by the government*. Accordingly, public-forum doctrine is not concerned with protecting everything that is operated as a place for public discussion and debate, but with protecting

government-run places for public discussion and debate, as a means of enforcing the First Amendment against the government. Indeed, the whole point of the public-forum doctrine is to assess the validity of "restrictions that *the government* seeks to place on the use of *its* property." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (emphasis added). There is no such creature as a privately owned and operated "public forum." That is why it is essential to *first* decide whether the person running the forum can be treated as the government before deciding whether the forum is a "public forum." Declaring someone a state actor because they open their property to the public is a complete non-sequitur, and misapprehends the role of public-forum doctrine in enforcing the First Amendment.

In fact, declaring someone a state actor because they open their property to the public would create all manner of perverse incentives, as private parties will be loath to open their property to public use if doing so converts them into *de facto* state actors. A property owner's decision to operate its private property as an open forum for speech and assembly (like a campus quadrangle or social media website) should be encouraged, not used as justification to subject that person to potential constitutional liability under §1983. *See Denver Area*, 518 U.S. at 737 ("[T]he First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech."). Deciding whether a forum for speech is a constitutional public forum before first deciding whether the owner and operator of that forum is the government is thus not

only incoherent as a doctrinal matter, but misguided as a policy matter.

The upshot is that the "exclusive public function" test must be applied *before* the public-forum test. The relevant question thus cannot be whether *operating a public forum* is an exclusive public function, but whether *operating a public-access television channel* is a function that historically has been "exclusively reserved to the State." *Flagg Bros.*, 436 U.S. at 168. It is only if the answer to that question is *yes* that public-forum analysis can coherently be applied. And as petitioners persuasively demonstrate, Petr.Br.43-46, the answer to the "exclusive public function" test is *no*: "The provision of cable television generally—or public access channels in particular—is not a function traditionally [or exclusively] provided by government." Petr.Br.43-44.

II. MNN's Public-Access Channels Are Not Public Forums Because They Are Private Property.

As discussed, this Court can resolve this case without reaching the public-forum question—and, in fact, deciding whether someone is a "state actor" by reference to whether that person is operating its property like a public forum would read the state-action requirement right out of the law. *See supra.* But to the extent this Court endeavors to resolve whether public-access channels are designated public forums, this Court should conclude that they are not, as the government may not designate *private* property as a *public* forum. Indeed, to do so would create takings problems of the first order.

As the Second Circuit recognized, public-access channels are private, not government, property. *See* Pet.App.12. While cable operators typically must request and obtain local franchises or state authorization from government authorities to install the cable needed to reach subscribers, the cable itself ordinarily remains the property of the cable operators. The channels that are transmitted through those privately owned cables thus "belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers." *All. for Cmty. Media v. F.C.C.*, 56 F.3d 105, 122 (D.C. Cir. 1995) ("*ACM*") (en banc), *aff'd in part, rev'd in part sub nom. Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996).

The fact that cable infrastructure is *privately* owned, combined with the fact that *private* public-access centers like CAN TV are entitled to the exclusive use and control of designated cable channels, should settle the public-forum question. "The public forum doctrine is a rule governing claims of a right of access to *public property*, and has never been thought to extend beyond property generally understood to belong to the government." *Denver Area*, 518 U.S. at 827 (Thomas, J.) (concurring in the judgment in part and dissenting in part) (emphasis added)). A public forum "is not, for instance, a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee." *ACM*, 56 F.3d at 121. Rather, a

"'public forum,' or even a 'nonpublic forum,' in First Amendment parlance is government property." *Id.*

Sure enough, every single one of this Court's "public forum cases has involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum." *Denver Area*, 518 U.S. at 828 (Thomas, J.); *see also, e.g.*, *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018) ("government-controlled property set aside for the sole purpose of voting"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) ("school property"); *Lee*, 505 U.S. at 681 ("publicly owned airport"); *United States v. Kokinda*, 497 U.S. 720, 723 (1990) ("postal sidewalk" that "lies entirely on Postal Service property").[3]

Likewise, when this Court has spoken of public forums more generally, it has made clear that they arise only on government property. *See, e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) ("[A] designated public forum ... exists where *government property* that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." (emphasis added)); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) ("[A] government entity may create a designated public forum if *government property* ... is intentionally opened up for that purpose." (emphasis added)); *United States v. Am.*

[3] The only possible exception is *Marsh v. Alabama*, 326 U.S. 501 (1946), but as petitioners explain, Petr.Br.32-34, that case does not have precedential force outside of its unique context.

Library Ass'n, Inc., 539 U.S. 194, 206 (2003) ("To create such a forum, the government must make an affirmative choice to open up *its property* for use as a public forum." (emphasis added)).

In their brief in opposition, respondents falsely claimed that in *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985), this Court "held" that "'private property dedicated to public use' can be a public forum." BIO.27 (quoting *Cornelius*, 473 U.S. at 801). This Court "held" no such thing. *Cornelius* did not even involve private property, let alone "private property dedicated to public use." The forum in *Cornelius* was the Combined Federal Campaign ("CFC"), which is "an annual charitable fund-raising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees." 473 U.S. at 790. The Court held that the CFC was a "nonpublic forum" and that there was no First Amendment violation. *Id.* at 805, 813. Because there was no private property at issue, the Court had no reason to (and did not) issue any "holding" about whether the government can designate *private* property a public forum.

The language that respondents quoted from *Cornelius* was a passing remark about how to define the relevant forum in any given case: "Although petitioner is correct that as an initial matter a speaker must seek access to public property *or to private property dedicated to public use* to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue." *Id.* at 801 (emphasis added); *see Denver Area*,

518 U.S. at 827 (Thomas, J.) (referring to passage as "dictum"); *ACM*, 56 F.3d at 122 (same).

That passage is not just dictum, but particularly strange dictum because the only cases that previously used language about "private property dedicated to public use" actually *rejected* any such doctrine. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the plaintiffs argued that the private property of a large shopping center was a public forum. They claimed that because the shopping center had sidewalks and streets that were "functionally similar to facilities customarily provided by municipalities," it had "been dedicated to certain types of public use" and thus should be treated as a public forum. *Id.* at 568-69. This Court *rejected* that argument, holding that "[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." *Id.* at 569; *see Hudgens v. NLRB*, 424 U.S. 507, 520 (1976) (quoting and reaffirming passage from *Lloyd*).

In all events, even if private property dedicated to public use could be a public forum, that would be only because it had been formally dedicated to public use—*i.e.*, because the government had acquired a property right. *See* Black's Law Dictionary (10th ed. 2014) (defining "dedication" as "[t]he donation of land or creation of an easement for public use"). In such a case, it would be "that government-owned property interest that may be designated as a public forum." *Denver Area*, 518 U.S. at 828 (Thomas, J.). Indeed, while this Court has recognized that property in which the government has a leasehold or less-than-fee-simple interest can be a public forum, *see Se.*

Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (privately owned theater under long-term lease to the city), it has declined to treat as a public forum private property over which the government has *control* but no formal property rights, *see Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114 (1981) (mailboxes of private homes).

None of this is to say that a State could not *acquire* an easement (or some other property interest) over a cable operator's public-access channels and then designate that easement as a public forum. But to do so, the government would have to negotiate with the cable operator to purchase an easement, include the grant of an easement in the terms of its franchise agreements, or exercise its eminent domain power. The government would be constrained in all three circumstances—respectively, by market forces, by this Court's unconstitutional conditions doctrine, *see Dolan v. City of Tigard*, 512 U.S. 374, 385-86 (1994), or by the requirement to pay "just compensation," *see United States v. Pewee Coal Co.*, 341 U.S. 114, 117 (1951). It cannot, however, do what respondents say it did here—*i.e.*, not acquire any property interest and then simply declare that someone else's property is a public forum. To do so would be to simply declare an easement over the cable operator's public-access channels, which would "obvious[ly]" be a taking. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *cf. id.* ("To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest ... is to use words in a manner that deprives them of all their ordinary meaning.").

Here, respondents have not alleged or argued that the government acquired or otherwise obtained any property right in MNN's public-access channels. Accordingly, the government cannot designate those channels as public forums.

III. The Decision Below Does Not Accord With The Realities Of Public-Access Television And Would Impose Unwarranted Burdens On Public-Access Operators.

As previously noted, CAC is steadfastly committed to fostering and supporting freedom of speech and freedom of expression, and does not have a policy of censoring the content of its producers. *See, e.g.*, CAN TV Access User Manual §IV.A, available at https://bit.ly/2SASBa6 ("CAN TV does not discriminate [on the basis of content]."). CAC's participation as *amicus* in this case is not driven by any desire to restrict content or restrain speech. Indeed, CAC's express mission is to provide Chicagoans a forum to exercise their "freedom of speech by providing technical training, equipment, facilities and programming opportunities on Chicago's public access television channels." *Id.* at 1.

That said, CAC strongly disagrees with the Second Circuit's decision, which improperly treats public-access channel operators as state actors and would impose stringent constitutional restrictions on their operations. That decision is divorced from the realities of public-access television and, if affirmed, would unduly interfere with CAC's operations and limit its ability to provide ordinary, work-a-day Chicagoans with an otherwise unattainable digital media platform to engage with their community.

CAC could very well be classified as a state actor subject to constitutional constraints under the test the Second Circuit applied below. As petitioners explain, the decision below essentially "amounts to a *per se* declaration that all public access channels ... are constitutional public fora, regardless of the type of operator or the nature and degree of government involvement with the channel or the operator." Petr.Br.35. The only qualification to that *per se* rule was that it would apply "only" to public-access channels that are authorized by federal law, mandated by state law, and designated by a franchise authority. Pet.App.13-14. But as petitioners accurately note, that describes almost all public-access channels in almost every state. Petr.Br.35. For example, public-access television in Chicago is authorized by federal law, *see* 47 U.S.C. §531(b) mandated by municipal law, *see* Chi., Ill. Mun. Code ch. 4-280, art. VII, §320, and operated by CAC pursuant to a designation by the city, *id.* §310.

Classifying MNN or CAC as a state actor would not accord with the on-the-ground realities. CAC in particular is not the government. CAC is not a branch or extension of local, state, federal, or any other government. It is not a "sister agency" of any branch of government. None of the members of its Board of Directors is appointed or controlled by any government official. The majority of its employees are members of a *private*-sector labor union. CAC is not funded by any government entity; rather, it derives its revenue directly from private cable operators and a video service provider (AT&T) and occasional nominal contributions from small private donations. This clear line of demarcation between CAC and the government

is no accident: The Chicago Municipal Code strictly forbids CAC from "[p]ermit[ting] operation of its channels to be subject to direct or indirect governmental interference with or control of program content." Chi., Ill. Mun. Code ch. 4-280, art. VII, §370(2).

Similarly, classifying public-access channels as "public forums" in the *constitutional* sense would ignore the very real differences between public streets and public parks on the one hand, and public-access channels on the other. For one thing, when the government administers a public park or allows picketers onto public streets, it has no interest or obligation to ensure that the speech or expressive message is interesting, relevant, or in any other sense pleasing to the audience. It thus makes perfect sense to restrict the government from enforcing any content-based restrictions unless those restrictions are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983); *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

While those strict limitations make sense when applied to governmental entities regulating public streets and sidewalks, they make little sense in the context of public-access television. CAC currently utilizes and operates five cable television channels, which are organized by the predominant type of content each one typically features:

- CAN TV19: Local perspectives, arts, music, sports

- CAN TV21: Live call-in programs, local politics, and education
- CAN TV27: Community news and live event coverage
- CAN TV36: Religious and inspirational programming
- CAN TV42: On-demand information on jobs, housing, health, and more with audio from a non-profit radio station

While CAC does not censor or otherwise restrict the content of any qualified producers, its cablecasting department requires at least enough editorial and managerial discretion to ensure that programs are televised on the proper channel and in the proper time slots. *See* Chi., Ill. Mun. Code ch. 4-280, art. VII, §370(1) (permitting CAC to "allocate ... channel space and time ... on a reasonable, nondiscriminatory basis"). By exercising its reasonable discretion to optimize programming, CAC enhances the viewer experience, builds its audience base, and ensures that programs will be viewed by receptive and appropriate members of the community.

Subjecting CAC to the strictures of public-forum analysis would cripple its ability to exercise that modest editorial and managerial discretion. Any decision it made about when and where to air a community-submitted program would become fodder for a federal lawsuit, where CAC would be forced to defend its editorial and managerial choices against strict public-forum standards. Adverse court decisions or the *in terrorem* effect of costly litigation (combined with a perennially modest and chronically tenuous

operating budget) could cause grave harm to CAC's ability to operate effectively.

Public-access channels are unlike traditional public forums for the additional reason that "[i]n no other public forum that [this Court has] recognized does a private entity ... have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf." *Denver Area*, 518 U.S. at 829 (Thomas, J.). When the government administers a public park or sidewalk, it is not obligated to provide speakers with a microphone or other technical assistance. CAC, on the other hand, does not just cablecast and stream programs. CAC also provides technical training, video equipment, and studio facilities for anyone seeking to produce his or her own programs, as well as production facilities and technical assistance to any qualifying member of the community.

Declaring public-access channels to be public forums thus would impose burdens on private parties that the government itself is not required to carry when it operates a public forum. *See id.* (Thomas, J.) ("[T]he numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of a public forum."). And the fact that CAC not only transmits speech but also assists producers in speaking and otherwise communicating to their chosen audiences means that CAC could not function without the ability to reasonably exclude particular individuals from accessing its facilities if those individuals were to threaten the safety of the

workplace or attempt to leverage their physical presence within the facility toward the end of intimidating, bullying, or harassing CAC staff. Treating public-access channels as public forums would undermine CAC's ability to be reasonably selective, set standards of behavior and deportment for its public patrons, and retain discretion to bar anyone it reasonably believes may pose a threat to its employees or workplace.

Finally, however this Court resolves this case, it should do so in a way that accounts for the significant variation among public-access operators and public-access channels across the country. Both petitioners and respondents correctly emphasize that a one-size-fits-all test is inappropriate in this context. Petitioners, for example, point out that "[t]here are over two thousand community PEG stations across the country run by a diverse mix of private nonprofit entities, cable operators, educational institutions, governmental entities, and others." Petr.Br.36. Respondents likewise recognize that different public-access channels operate under different legal frameworks and implement different policies, and that legal analysis under 42 U.S.C. §1983 should accordingly be "context-based." BIO.14-20.

CAC has several characteristics that other operators across the country may not share and that could bear on analyses of whether CAC acts "under color of state law" or whether the channels it operates are subject to the same constitutional restrictions as parks and sidewalks. For example, the separation between CAC and the government is more pronounced than in many other places. As noted, CAC receives *no*

funding from the government and has *no* government-appointed officials or government-appointed representatives on its board. Furthermore, CAC operates in Chicago, one of the nation's largest and most diverse markets. Because of the size of the market and the diversity of producers and viewers, CAC operates five separate channels—and as a result, requires more editorial and managerial discretion than a one-channel operator might need. And, regrettably, CAC operates in a city where the above-mentioned concerns about safety are particularly pronounced.

Those factors and others like them underscore the importance of adopting a standard that can take such differences into account. But no matter the ultimate confines of the test this Court adopts, the answer in *this* case is clear. Where, as here, the government is not the source of authority under which the defendant acted; the defendant is not a "state actor" under any of this Court's tests; and the government does not hold any property interest in the defendant's public-access channel, the defendant cannot be held liable under 42 U.S.C. §1983.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed as to petitioners.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, *et al.*,

Petitioners,

v.

DEEDEE HALLECK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION, IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST[1]

Recognizing the Internet's power as a tool of democratization, for more than 25 years, the Electronic Frontier Foundation (EFF) has worked to protect the rights of users to transmit and receive information online. EFF is a non-profit civil liberties organization with more than 37,000 dues-paying members, bound together by a mutual and strong interest in helping the courts ensure that such rights remain protected as technologies change, new digital platforms for speech emerge and reach wide adoption, and the Internet continues to re-shape governments' interactions with their citizens. EFF frequently files *amicus* briefs in courts across the country, including a brief to the Supreme Court in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), that was cited in the majority opinion.

SUMMARY OF THE ARGUMENT

The interaction between the state action and public forum doctrines has far-reaching applications, well beyond the particular contours of public access television. This Court, in reaching whatever decision it does on the particular facts before it in this case, must rule narrowly, and with an eye toward application of its ruling in other contexts.

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1. Pursuant to Supreme Court Rule 37.2(a), *amicus* has provided timely notice to all counsel, and all parties consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* states this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or their counsel made a monetary contribution to fund the preparation or filing of this brief.

Certainly, the mere fact that something is either labeled a "public forum" or operated by a private entity as a space generally open for communication by others does not automatically transform that private entity into a state actor. Nor is the mere fact that the government reaches out to regulate the "forum" a sufficient trigger. Rather, a private entity is not a state actor unless the government has acted to affirmatively delegate its own role in administering a communicative space to that private entity or otherwise exercised significant control over the forum.[2]

Amicus curiae Electronic Frontier Foundation has a special interest in assuring that this Court's ruling does not wreak unintended havoc on the rights of online speakers and the private platforms they use to disseminate their messages. In particular, the private operators of online platforms should remain exactly that, private operators. That this Court has quite accurately characterized the Internet as a "modern public square," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017), and "the most important places for the exchange of views," *id.* at 1735, that enable any person to "become a town crier with a voice that resonates farther than it could from any soapbox," *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997), does not change this result. That a private entity created and/or maintains such a communicative platform does not, without significantly more action from the government itself, transform the private entity into

2. The Second Circuit's opinion is unfortunately unclear as to whether this essential element was sufficiently pleaded in the Complaint so as to justify reversing the granting of Appellant's motion to dismiss. To the extent the Second Circuit did not rely on such a finding, amicus disagrees with the court's reasoning.

a state actor. Amicus urges this Court to take care in crafting its opinion here so as not to compel the opposite result, or provide fodder to lower courts to do so.

Internet users' rights are best served by preserving the constitutional status quo, whereby private parties who operate private speech platforms have a First Amendment right to edit and curate their sites, and thus exclude whatever other private speakers or speech they choose.[3] To reverse the application of the First Amendment—that is, to make online platforms no longer *protected* by the First Amendment but instead *bound* by it as if they were government entities—would undermine Internet users' interests.

First, online platforms would largely be prohibited from moderating content, even though content moderation can be valuable and is supported by many Internet users when carefully implemented.

Second, the emergence of new online platforms would be inhibited by the great legal uncertainty created by the imposition of the multifaceted public forum doctrine on private platforms.

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3. However, this brief should not be read as an encomium for Internet platforms, especially the larger ones that enjoy outsized power to steer public discourse. There is no denying that inconsistent and opaque private content moderation is a problem. Although the First Amendment prevents government from dictating content moderation practices, Internet platforms should voluntarily adopt content moderation practices that follow a human rights framework, as more fully noted below, that maximizes transparency and due process.

We thus urge this Court to rule carefully and narrowly.

ARGUMENT[4]

I. Government Action is a Prerequisite to the Existence of a "Public Forum"; There Can Thus Be No State Action Without Some Significant Governmental Connection to the Operation or Use of the Forum

In deciding this case, this Court must be careful to avoid the logical fallacy of circular reasoning: the private actor is a state actor because it is operating a public forum and only governments operate public forums.

That reasoning is fallacious because it is government action that triggers the public forum doctrine in the first place. *See Southeastern Productions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (invoking the public forum doctrine when the government controlled the use of a privately owned theater). Although the term "public forum" is also used colloquially, it is government action that distinguishes the places open for the exchange of ideas that are subject to the "public forum doctrine" from those places that are not. There can be no "public forum," as that term of art is used with respect to this Court's public forum doctrine, without significant involvement of the government itself.

Indeed, the distinction between governmental and nongovernmental control of the forum is essential to the public forum doctrine as a whole. As this Court has

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4. All Web sites cited in this brief were last visited on Dec. 4, 2018.

explained, the public forum doctrine arose from the fact that the government owned and controlled real property: "the Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).[5] It was thus a recognition of the government's special constitutional obligation to the speakers who used its property as distinct from private property owners who had no such obligations. *Cf. Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (holding that government property owner had right to enforce trespass laws just like private property owner). Generally allowing property to be used by others for communicative purposes was not exclusively a function of the government. Rather, the government differed from private property owners in that only the government allowed certain *government* property to be used by others for communicative purposes.[6]

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5. The quotation has its origins in *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939). In that case the Court declined to follow its earlier decision in *Davis v. Commonwealth of Massachusetts*, 167 U.S. 43, 47 (1897), in which this Court held that "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." In *Hague*, this Court instead defended the rights of people to use public lands, calling it a right of citizens "from ancient times." 307 U.S. at 515.

6. It is unclear what state action test the Second Circuit used in the underlying case; the court noted seven possible situations in which state action might be found, but never clearly indicated which path it followed. *See Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300, 304–05 (2d Cir. 2018) (citing *Brentwood*

The public forum doctrine remains an acknowledgement that while the government and the public often perform the *same* functions as property owners, the government has different constitutional responsibilities to those members of the public who use government property for their own communicative purposes

Thus, with respect to state action, "[c]ertainly, property does not become a public forum simply because a private owner generally opens his property to the public." *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1255 (10th Cir. 2005) (citing *Hudgens v. Nat'l Labor Relations Bd.*, 424 U.S. 507, 519–21 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972)).[7]

Rather, there must be some significant government action in either creating the forum, using the forum itself, or, most typically, delegating the responsibility for maintaining the public use of the forum to the private actor.

Academy v. Tenn. Secondary School Ass'n, 531 U.S. 288, 296 (2001)). To the extent the Second Circuit performed a "public function" analysis, as the concurrence below suggests, *see Halleck*, 882 F.3d at 308 (Lohier, J concurring), that analysis would require that the state delegate a "traditional governmental function" to the private entity. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991). That traditional function is absent here.

7. *Marsh v. Alabama*, 326 U.S. 501 (1945), this Court's seminal state action/First Amendment case, is not inconsistent with this result. As this Court explained in *Hudgens*, 424 U.S. at 516–17, the public function the private actor was performing in *Marsh* was not the mere operation of a public forum: it was the operation of an entire town; the public forum was just one component of that larger enterprise.

Importantly, state action is not a disputed issue in the reverse situation, when the government is challenged for its use of private property as a forum for the speech of others. This Court addressed such a situation in *Southeastern Productions, Ltd. v. Conrad*, 420 U.S. 546 (1975). In that case, the relevant forum was a privately-owned theater under long term lease to the city of Chattanooga. *Id.* at 547. Because the government's use of the theater was the very action challenged, the state action was clear, and this Court's opinion doesn't even mention the issue.

Accordingly, state action is similarly obvious when government uses private social media sites, like Facebook, Twitter, and Instagram for government purposes.[8] When a government so uses a privately owned social media platform, that government is clearly a state actor and the interactive spaces of the social media platforms it uses for governmental business are often public forums. *See, e.g., Knight First Amendment Institute at Columbia University. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018) (finding the interactive spaces created by President Trump's tweets to be designated public forums), *appeal docketed*, No. 18-1691 (2d Cir. June 4, 2018); *Davison v.*

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8. Indeed, the use by government agencies and officials of privately owned social media platforms is widespread. Over 10,000 social media profiles for U.S. federal agencies and sub-agencies have been registered with the United States Digital Service. For a searchable database of registered federal government profiles, *see* https://usdigitalregistry.digitalgov.gov/. As for Congress, all 100 senators and the overwhelming majority of representatives use social media. Jacob Straus and Matthew E. Glassman, *Social Media in Congress: The Impact of Electronic Media on Member Communications*, R44509, Cong. Research Serv. (May 26, 2016), https://fas.org/sgp/crs/misc/R44509.pdf.

Plowman, 2017 WL 105984, *4 (E.D. Va. 2017) (finding the comment section on a public official's Facebook page to be a limited public forum), *appeal docketed*, No. 16-00180 (4th Cir. June 27, 2017).

But those uses by governments do not convert the entire platform, governmental and nongovernmental accounts alike, into a public forum; nor does it transform the platform owner into a state actor limited by the First Amendment, rather than protected by it. The situation in which a private party operates a platform generally open to the public, is distinct from the situation in which *the government* uses a privately owned platform for governmental purposes.

The Second Circuit's ambiguous treatment of the state action-public forum interaction lends itself to misinterpretation, and out-of-context citation, and should be clarified. The Second Circuit wrote the following:

> Because facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 265-68 (1981) (regulation issued by state university Board of Curators governing use of university buildings and grounds); *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 169 76 (1976) (order issued by state employment commission

> governing employee speech at public school board meeting).

Halleck v. Manhattan Community Access Corp., 882 F.3d 300, 306–07 (2d Cir. 2018).

This statement, taken alone, is incorrect. And the cases cited in support, each of which dealt with public school administrators, do not support any application to nongovernment actors. The statement appears intended to be descriptive: there is usually a government actor controlling a public forum so usually, as in *Southeastern Productions*, there is no dispute as to state action or need for a court to consider it.

The sentence is somewhat clarified later in the same paragraph: a privately operated forum will not be considered a public forum for First Amendment purposes without a "sufficient connection to governmental authority."

> In the pending case, however, the facilities deemed to be public forums are public access channels operated by a private non-profit corporation. In this situation, whether the First Amendment applies to the individuals who have taken the challenged actions in a public forum *depends on whether they have a sufficient connection to governmental authority to be deemed state actors.*

Id. (emphasis added). But of course, that the first sentence will inevitably be relied upon without the remainder of the paragraph.

As stated, amicus takes no position on whether that "sufficient connection" was adequately pleaded in this case. But this Court, in making that assessment, should define the term carefully.

II. Internet Users are Best Served by the Availability of Both Unmoderated and Moderated Platforms

Preserving the rights of the private operators of online platforms to curate and edit the content of their sites—a result that will not be possible if they are subject to this Court's public forum doctrine—best serves Internet users, by allowing for both moderated and unmoderated platforms for speech.

A. In Praise of Unmoderated Platforms

Unmoderated platforms, where the platform operator plays little to no role in selecting the content, benefit Internet users by inhibiting the creation of silos, and allowing users to engage in free-form discussions, participate in debates of their choosing, and find unexpected sources of ideas and information. Users need not fear that their communications are actively monitored, nor that they may accidentally run afoul of content rules—both of which can inhibit free speech. Unmoderated platforms can be of special value to political dissidents and others who may be targeted for censorship by governments and private actors.

Indeed, the larger online platforms are bad at content moderation and struggle to draw lines between speech that is and is not permitted *according to their very own*

content rules.[9] For example, Facebook decided, in the midst of the #MeToo movement, that the statement "men are scum" and similar statements constituted hate speech according to its policies.[10] The company also removed posts of women sharing the hate speech others directed toward them.[11] Twitter shut down the verified account of a prominent Egyptian journalist and human rights activist.[12] Twitter also marked tweets containing the word "queer" as offensive, regardless of context.[13] YouTube has come under fire for restricting and demonetizing LGBTQ

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9. Every year, numerous incidents in which content standards were erroneously or inappropriately applied make the headlines of major news publications—and are tracked by the EFF project Onlinecensorship.org. https://onlinecensorship.org/

10. Samuel Gibbs, ***Facebook bans women for posting "men are scum" after harassment scandals***, Guardian (Dec. 5, 2017), https://www.theguardian.com/technology/2017/dec/05/facebook-bans-women-posting-men-are-scum-harassment-scandals-comedian-marcia-belsky-abuse.

11. Tracy Jan and Elizabeth Dwoskin, ***A white man called her kids the n-word. Facebook stopped her from sharing it.***, Washington Post (July 31, 2017), https://www.washingtonpost.com/business/economy/for-facebook-erasing-hate-speech-proves-a-daunting-challenge/2017/07/31/922d9bc6-6e3b-11e7-9c15-177740635e83_story.html.

12. Martin Belam, ***Twitter under fire after suspending Egyptian journalist Wael Abbas***, Guardian (Dec. 18, 2017), https://www.theguardian.com/media/2017/dec/18/twitter-faces-backlash-after-suspending-egyptian-journalist-wael-abbas.

13. Taylor Wofford, ***Twitter was flagging tweets including the word "queer" as potentially "offensive content,"*** Mic (June 22, 2017), https://mic.com/articles/180601/twitter-was-flagging-tweets-including-the-word-queer-as-potentially-offensive-content#.kUbwJTI0E.

content.[14] Online platforms have silenced individuals engaging in anti-racist speech[15]; suspended the account of an LGBTQ activist calling out their harasser;[16] disappeared documentation of police brutality,[17] the Syrian war,[18] and the human rights abuses suffered by the Rohingya.[19] A blanket ban on nudity has repeatedly been used to take down a famous Vietnam war photo.[20] In the

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14. Megan Farokhmanesh, *YouTube is still restricting and demonetizing LGBT videos—and adding anti-LGBT ads to some*, Verge (June 4, 2018), https://www.theverge.com/2018/6/4/17424472/youtube-lgbt-demonetization-ads-algorithm.

15. Natalie Weiner, *Talib Kweli Calls Out Instagram for Deleting His Anti-Racism Post*, Billboard (July 1, 2015), https://www.billboard.com/articles/columns/the-juice/6613208/talib-kweli-instagram-deleted-post-anti-racism-censorship.

16. Kaitlyn Tiffany, *Twitter criticized for suspending popular LGBTQ academic @meakoopa*, Verge (June 13, 2017), https://www.theverge.com/2017/6/13/15794296/twitter-suspended-meakoopa-anthony-oliveira-controversy.

17. Kevin Anderson, *YouTube suspends Egyptian blog activist's account*, Guardian (Nov. 28, 2007), https://www.theguardian.com/news/blog/2007/nov/28/youtubesuspendsegyptianblog.

18. Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, N.Y. Times (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/world/middleeast/syria-youtube-videos-isis.html.

19. Betsy Woodruff, *Exclusive: Facebook Silences Rohingya Reports of Ethnic Cleansing*, Daily Beast (Sept. 18, 2017), https://www.thedailybeast.com/exclusive-rohingya-activists-say-facebook-silences-them.

20. Sam Levin, Julia Carrie Wong, Luke Harding, *Facebook backs down from "napalm girl" censorship and reinstates photo*, Guardian (Sept. 9, 2016), https://www.theguardian.com/technology/2016/sep/09/facebook-reinstates-napalm-girl-photo.

aftermath of violent protests in Charlottesville, Virginia, and elsewhere, social media platforms faced increased calls to police content, shut down more accounts, and delete more posts.[21] Paradoxically, marginalized groups have been especially hard hit by this increased policing, hurting their ability to use social media to publicize violence and oppression in their communities.

As explained below, these online platforms should have the legal right to makes these decisions. But they can have significant consequences for online speech—and those users who have been muted by them are rightfully concerned about how content rules are enforced against them. Given the centrality of the Internet to modern communication, a world where unmoderated online platforms cannot exist would be a woefully impoverished one.

B. Moderated Platforms Are Also Valuable

But Internet users are also well-served by the availability of consistently and transparently moderated platforms. Many users may prefer to use online platforms that endeavor to shield them from certain kinds of speech. Moderation allows online platforms to limit content in order to create affinity or niche communities dedicated

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21. Alexis C. Madrigal, *Inside Facebook's Fast-Growing Content-Moderation Effort*, Atlantic (Feb. 7, 2018), https://www.theatlantic.com/technology/archive/2018/02/what-facebook-told-insiders-about-how-it-moderates-posts/552632/.; James Bovard, *Facebook censored me. Criticize your government and it might censor you too.*, USA Today (Oct. 27, 2017), https://www.usatoday.com/story/opinion/2017/10/27/facebook-censored-cross-your-countrys-government-and-they-might-censor-you-too-james-bovard-column/795271001/.

to certain subject matters or viewpoints, or to remove hateful or harassing speech that may hinder the ability of targeted users to engage with the platform.

If general purpose online platforms like YouTube, Facebook, and Twitter are easily deemed designated public forums, *see* Appellant Br. [ECF No. 7] at 33-34, and are thus bound by the First Amendment, they could exclude *only* content that falls outside the protection of the First Amendment.[22] Such platforms, while generally promoting diverse content and views, would *not* be able to remove, for example, non-obscene nudity; non-threatening violent content; false but non-harmful or non-defamatory content; or any content that is contrary to the platform host's or its community's values, but is nevertheless protected by the First Amendment.[23]

But the imposition of the public forum doctrine onto private platforms also threatens the existence of openly moderated platforms, those that do not hold themselves out as "modern public squares."

The public forum doctrine is multifaceted, comprised of varying degrees of government fora, including not only traditional and designated public forums, but also "limited

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22. Meaning, the content is deemed to be within a traditionally unprotected category of speech or because a particular moderation decision survives strict scrutiny. *See U.S. v. Alvarez*, 567 U.S. 709, 717, 724 (2012).

23. *See, e.g., Reno*, 521 U.S. at 874 (1997) (non-obscene but indecent sexual content is protected by First Amendment); *Elonis v. U.S.*, 135 S. Ct. 2001, 2012 (2015) (certain threatening speech is protected by First Amendment); *Alvarez*, 567 U.S. at 723 (certain non-harmful false speech is protected by First Amendment).

public forums," limited to certain subjects or speakers, and "nonpublic forums," where the forum operator is highly selective about allowing third-party speech. *See Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469-70 (2009). All government forums are subject to First Amendment restrictions; even nonpublic forums must be free from viewpoint discrimination and unreasonable content restrictions. *See Minn. Voters*, 138 S. Ct. at 1885. Nonpublic forums are thus scrutinized with some rigor: just this past term, this Court struck down a content restriction in a nonpublic forum. *Minn. Voters*, 138 S. Ct. at 1888 ("Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out.").

A court cannot import only one facet of the entire doctrine—the designated public forum—and leave the other facets behind. Thus, private online platforms that are openly and unabashedly moderated might avoid being deemed designated public forums like YouTube or Facebook. But such moderated platforms may necessarily be considered limited or nonpublic forums that would be unable to excise views they deem personally abhorrent or unwanted by the vast majority of their users.

III. The First Amendment Protects Internet Hosts' Right to Curate Their Platforms

Private entities that operate online platforms for speech and that open those platforms for others to speak enjoy a First Amendment right to edit and curate the content they host. These rights will be negated if the operators are found to be state actors.

The Supreme Court has long held that private publishers have a First Amendment right to control the content of their publications. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974). *See also Los Angeles v. Preferred Comms., Inc.*, 476 U.S. 488, 494 (1986) (recognizing cable television providers' First Amendment right to "exercise[e] editorial discretion over which stations or programs to include in its repertoire"); *Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 134 (9th Cir. 1971) (rejecting argument that Los Angeles Times' "semimonopoly and quasi-public position" justified order compelling to publish certain advertisements). This intrusion into the functions of editors is *per se* unconstitutional even if the compelled publication of undesired content would not cause the publisher to bear additional costs or forgo publication of desired content. *Tornillo*, 418 U.S. at 258.

In so holding, the *Tornillo* Court rejected "vigorous" arguments that "the government has an obligation to ensure that a wide variety of views reach the public." *Id.* at 248. The arguments made by the party seeking compelled publication in a print newspaper are strikingly similar to those now raised against Internet platforms. In *Tornillo*, plaintiff argued that the press in 1974 bore little resemblance to the one known to the ratifiers of the First Amendment: because of a "concentration of control of outlets to inform the public," the news media had "become big business," and "noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events." *Id.* at 248–49. Supporters of the compelled publication law argued that:

> The result of these vast changes has been to place in a few hands the power to inform the American people and share public opinion. . . . The abuses of bias and manipulative reportage are, likewise, said to be the result of vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed the public has lost any ability to respond or contribute in a meaningful way to the debate on the issues. . . . The First Amendment interest of the public in being informed is said to be in peril because "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Id. at 250.

The *Tornillo* Court did not dispute the validity of these concerns, but nevertheless found that governmental interference with editorial discretion was so anathema to the First Amendment and the broader principles of freedom of speech and the press that the remedy for these concerns must be found through "consensual mechanisms" and not by governmental compulsion. *Id.* at 254.

Though phrased in terms of traditional print newspaper publishers, *Tornillo* has been applied in a variety of speech contexts, including thrice this past Supreme Court term. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018); *Nat'l Inst. of Family Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring). In one noteworthy non-press setting, the Supreme Court applied *Tornillo*, among other authorities, in holding that

the organizers of a parade had a First Amendment right to curate its participants, and thus could not be required to include a certain message, even if the parade was perceived as generally open for public participation. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995). As the *Hurley* Court explained,

> a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.

Id.

Every court that has considered the issue has applied *Tornillo* to social media platforms that primarily, if not exclusively, publish user-generated content. *See, e.g., Robinson v. Hunt County, Texas*, 2017 WL 7669237, *3 (N.D. Tex. 2017), *appeal docketed*, No. 18-10238 (5th Cir. Mar. 2, 2018); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007).

Any decision of this Court that requires that Internet platforms generally open for public communication to include content they want to exclude would run head-first into the editorial rights enshrined in *Tornillo* and *Hurley*.[24]

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24. As this Court referenced in *Tornillo*, 418 U.S. at 254, "consensual mechanisms" remain the best way to address the very

CONCLUSION

This Court, in reaching whatever decision it does on the particular facts before it in this case, must rule narrowly, and with an eye toward application of its ruling in other contexts. The mere fact that something is either labeled "public forum" or operated by a private entity as a space generally open for communication by others does not automatically transform that private entity into a state actor. Nor is the mere fact that the government reaches out to regulate the forum a sufficient trigger. Rather, a private entity is not a state actor unless the government has acted to affirmatively delegate its own role in administering a communicative space to that private entity or otherwise exercised significant control over the forum.

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real human rights implications of the large Internet platforms opaque and seemingly arbitrary content moderation practices. Internet users should thus demand increased accountability, clear and consistent takedown rules, and robust due process that includes a fair and transparent removal process. The Santa Clara Principles, *www.santaclarprinciples.org*, endorsed by a broad range of civil society groups, including *amicus*, offer one such human rights framework. First, companies should publish the number of posts removed and accounts permanently or temporarily suspended, demonetized, or otherwise downgraded, due to violations of their content rules. Second, the companies should provide clear notice to all users about what types of content are prohibited, and clear notice to each affected user about the reason for the limitations placed on their content or account. And third, companies should enable users to engage in a meaningful and timely appeals process for any content removals or account limitations. *See EFF and Coalition Partners Push Tech Companies To Be More Transparent and Accountable About Censoring User Content*, EFF Press Release (May 7, 2018), https://www.eff.org/press/releases/eff-and-coalition-partners-push-tech-companies-be-more-transparent-and-accountable; https://santaclaraprinciples.org/.

Dated: December 11, 2018

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No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF INTERNET ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICUS CURIAE*

Internet Association represents roughly forty leading technology companies. Its membership includes a broad range of Internet companies, from travel sites and online marketplaces to social networking services and search engines. Internet Association advances public policy solutions that strengthen and protect Internet freedoms, foster innovation and economic growth, and empower small businesses and the public. It respectfully submits this Brief of *Amicus Curiae* in Support of Neither Party to encourage this Court to limit its decision to the unique facts of this case so that its decision does not unintentionally disrupt the modern, innovative Internet.[1]

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[1] In accordance with Supreme Court Rule 37.6, *amicus* certifies that (1) this brief was authored entirely by counsel for *amicus curiae* and not by counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to fund preparing or submitting this brief; and (3) apart from *amicus curiae*, its members, and its counsel, no other person contributed money to fund preparing or submitting this brief.

I. INTRODUCTION

This case presents an exceedingly narrow question for the Court's consideration: whether a private non-profit corporation, appointed by a government official to oversee a cable television public access channel, qualifies a state actor for First Amendment purposes. On its face, that issue has little to do with Internet Association or its members. As Respondents acknowledge, and as the most cursory examination of the facts at issue makes clear, "social media [and other Internet services are] *nothing like* petitioner MNN" and thus "[t]he decision below . . . does not compel any conclusions about the application of the First Amendment to [such services]." Brief in Opposition ("BIO") at 35 (emphasis added). Petitioners agree that Internet services "are not, and should not be considered, constitutional public fora." Petitioner's Br. at 56.

Nevertheless, *amicus curiae* is concerned that any decision that deems MNN a state actor will be misinterpreted in ways that are highly damaging to the Internet. In particular, Internet Association fears that litigants and lower courts will misread such a decision as a general loosening of the exacting restrictions this Court has historically applied when considering whether a private space, operated by a private company, is subject to constitutional scrutiny.

This fear is not unfounded. In recent years, numerous plaintiffs, some bolstered by overbroad or incorrect interpretations of this Court's decision in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), have attempted to treat Internet companies as state

actors.[2] Thus, while Internet Association takes no position on the question of whether MNN itself is a state actor, it respectfully asks that the Court be mindful that any decision it issues in this case could have effects far beyond the specific context of public access television channels.

In so doing, this Court should emphasize two principal points to prevent any confusion about the legal rights and responsibilities of Internet companies. *First*, this Court should make clear that private property will be deemed a public forum, and the regulation of private property will be deemed a "public function," only in extraordinary circumstances. This Court rarely, if ever, permits the application of these doctrines to private property. To the extent it has deviated from this rule, this Court has done so only when the private property at issue was operated by the state, subject to considerable state regulation, or had taken on *all* of the attributes of a state or local government. Private property owned by a private entity over which the government exercises no control cannot qualify as a public forum. And the regulation of private property that does not in effect function as a "company town" is not a "public function." Those principles, drawn from years of precedent, should remain the guideposts for any analysis of whether MNN is a state actor under the distinctive circumstances of this case.

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[2] *See e.g.*, *Prager Univ. v. Google LLC*, 2018 WL 1471939, *5 (N.D. Cal. Mar. 26, 2018) ("Plaintiff contends that [YouTube and Google] are state actors under the 'public function' test" and cited *Packingham* in support of this claim).

Second, a private property owner is not converted into a state actor merely because it operates a space where free expression is encouraged to occur. Similarly, a *private* space does not become *public* when it shares certain characteristics of a classic public forum. A public access channel may be, as the Second Circuit held in this case, "the electronic version of the public square." *Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300, 306 (2d Cir. 2018). And the Internet may be "the modern public square." *Packingham*, 137 S. Ct. at 1737. But those facts alone are insufficient to transform these spaces into public forums for purposes of the First Amendment. Instead, the critical antecedent question is whether the private space is, or has all the attributes of, a public forum. A space that is not owned, leased, controlled, or heavily regulated by the government *cannot* be a public forum under this Court's well-established precedent.

At bottom, Internet Association simply asks that "[i]n considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court . . . proceed with caution." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 806 (2011) (Alito, J., concurring). More than two decades ago, a plurality of this Court warned that it was "not at all clear that the public forum doctrine should be imported wholesale" into a "new and changing area"—then the innovative field of cable television. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 749 (1996). The time appears to have come to resolve the question left open in *Denver Area*, but it has not yet arrived for the Internet.[3] Prudence, and

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[3] Indeed, numerous courts have rightly held that Internet companies are *not* state actors. *See, e.g.*, *Prager Univ.*, 2018 WL

this Court's "necessarily fact-bound" approach to determining whether a private entity is a state actor, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982), counsel in favor of a narrow decision limited to the unique facts of this case.

1471939, at *8 (holding that YouTube and Google were not "state actors that must regulate the content on their privately created website in accordance with the strictures of the First Amendment"); *Nyabwa v. FaceBook*, No. 2:17-CV-24, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018) ("Because the First Amendment governs only governmental restrictions on speech, Nyabwa has not stated a cause of action against FaceBook."); *Shulman v. Facebook.com*, No. CV 17-764 (JMV), 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) ("The Court also notes that efforts to apply the First Amendment to Facebook . . . have consistently failed."); *Forbes v. Facebook, Inc.*, No. 16 CV 404 (AMD), 2016 WL 676396, at *2 (E.D.N.Y. Feb. 18, 2016) ("Facebook is a private corporation, and Mr. Forbes does not allege any facts that could support a claim of a 'close nexus' between Facebook and the state, such that Facebook's actions (or inaction) may be fairly attributable to the state."); *Doe v. Cuomo*, No. 10-CV-1534 (TJM/CFH), 2013 WL 1213174, at *9 (N.D.N.Y. Feb. 25, 2013) (holding that Facebook not state actor under joint action test); *Kinderstart.com LLC v. Google, Inc.*, No. C 06- 2057 JF (RS), 2007 WL 831806, at *14 (N.D. Cal. Mar. 16, 2007) (concluding Google was not state actor); *see also, e.g.*, *Green v. America Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003) ("AOL is a private, for profit company and is not subject to constitutional free speech guarantees. . . . We are unpersuaded by Green's contentions that AOL is transformed into a state actor because AOL provides a connection to the Internet on which government and taxpayer-funded websites are found, and because AOL opens its network to the public whenever an AOL member accesses the Internet and receives email or other messages from non-members of AOL."); *Howard v. America Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (concluding that AOL was not a state actor where plaintiffs had argued that "AOL is a 'quasi-public utility' that 'involv[es] a public trust'").

II. THERE IS AN EXCEEDINGLY HIGH BAR FOR SUBJECTING PRIVATE ACTORS TO CONSTITUTIONAL SCRUTINY

This Court has rarely found that a private entity should be subject to the First Amendment obligations traditionally imposed on governmental actors. Indeed, whether one applies this Court's various state action tests or accepts the Second Circuit's position that the public forum test sheds light on the First Amendment's applicability to MNN's actions, the bar to finding that any private entity's actions are subject to constitutional scrutiny is exceptionally high. This case presents no occasion to deviate from, or diminish, these stringent standards.

A. Public Forum Analysis is Almost Never Appropriate When Applied to Private Property

Public forum analysis typically applies only to spaces that are owned and therefore controlled by the government. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal, Hastings College of the Law v. Martinez*, 561 U.S. 661, 679 (2010) ("[I]n a progression of cases, this Court has employed forum analysis to determine when a governmental entity, *in regulating property in its charge*, may place limitations on speech.") (emphasis added); *Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 827 (Thomas, J., concurring in judgment in part and dissenting in part) ("The public forum doctrine is a rule governing claims of a right of access to public property and has never been thought to extend beyond property generally understood to belong to the government.") (internal citation and quotation marks omitted);

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 956 (9th Cir. 2011) ("The Supreme Court has never allowed privately owned venues to substitute for public fora."). Indeed, the Court has often drawn a sharp divide between private and public property when analyzing putative public fora. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-81 (1992) (dismissing evidence of speech activity that occurred at rail stations and bus stations as "irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had *private* ownership" and concluding that the "practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport") (emphasis in original).

To be sure, this Court has sometimes suggested that private property dedicated to public use may be deemed a public forum. Respondents point to two such cases: *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985) and *Marsh v. Alabama*, 326 U.S. 501 (1946). BIO at 27. But the Court made this suggestion only *in dicta* in *Cornelius*[4]

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[4] *See* Petitioner's Br. at 31 ("Respondents have previously argued that dicta in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), extends the public forum analysis to 'private property dedicated to public use.' *Id.* at 801. But *Cornelius only makes this statement in passing, with no elaboration, analysis or discussion. See id.* at 801-06.") (emphasis added); *see also Prager Univ.*, 2018 WL 1471939, at *8 ("Although both [*Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, and *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985)] mentioned that public forums may include 'private property dedicated to public use' . . . both cases addressed whether certain speech restrictions enacted by

and *Marsh* has both been carefully limited to its facts and has long been considered a "public function," rather than a public forum case. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158-59 (1978) ("A second line of cases under the public-function doctrine originated with *Marsh v. Alabama* . . . .).

This Court's decision in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), is far more instructive. There, the Court held that a "privately owned . . . theater under long-term lease to the city" was a public forum for First Amendment purposes. *Id.* at 547. In other words, the government may not have owned the property at issue in *Conrad*, but it controlled it under a formal legal arrangement and essentially stepped into the shoes of the private owner for the period of the long-term lease. That holding, rather than *Cornelius*' *dicta*, better demonstrates the kind of role the government must play with respect to a particular private space for it to be transformed into a public forum.

Thus, if this Court determines that public access channels are private property, the Second Circuit's decision can be harmonized with this Court's precedents only if it is understood to fall within a

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the federal government violated the First Amendment. Specifically, *Denver Area* involved a challenge to a federal statute regulating the broadcasting of offensive 'sex-related material on cable television,' 518 U.S. at 732, while *Cornelius* addressed a challenge to an executive order that excluded 'legal defense and political advocacy organizations' from participating in a 'charity drive aimed at federal employees.' 473 U.S. at 790. Therefore, neither case addressed the circumstances in which a private property owner must be treated as a state actor for constitutional purposes.").

narrow category of cases in which private property over which the government exerts a significant degree of ownership or control is deemed a public forum. *See Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300, 306 (2d Cir. 2018) (holding that because "federal law authorizes setting aside channels for public access," state regulation and the terms of a municipal contract both require the provision of such a channel and "a municipal official has designated a private corporation to run those channels" the channels at issue here are public fora). It should go without saying that this kind of public forum analysis could not and should not extend to private organizations like *amicus curiae*'s members, which retain complete ownership and control over their Internet services.[5] They are, in the words of this Court, "not fora at all." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-79 (1998).

B. "Public Function" Analysis Also Sets a High Standard

This Court has set forth several tests for determining whether a private actor should be treated as a state actor for purposes of the First Amendment. Although the parties do not agree about the appropriate state action test to apply in this case, *compare* Pet. Reply Br. for Writ of Certiorari at 5, *with* BIO at 21-28, they do agree on one thing. Neither party has suggested that this Court should find that

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[5] *See, e.g.*, *Knight First Amendment Institute v. Trump*, 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018) ("Twitter is a private (though publicly traded) company that is not government-owned."); *id.* at 567 ("Twitter . . . maintains control over . . . all . . . Twitter accounts").

MNN is a state actor under any standard other than the so-called "public function" test.

"Under the public function test, state action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity." *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 264-65 (2d Cir. 2014) internal quotation marks omitted). Thus, "the relevant question" when applying this test "is not simply whether a private group is serving a 'public function,'" but rather "whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). This test is "difficult to satisfy," *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 390 (10th Cir. 2016), in large part because "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State,'" *Flagg Bros.*, 436 U.S. at 158 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)). And this Court has routinely rebuffed litigants' attempts to expand the scope of this doctrine to encompass the "broad principle that all businesses affected with the public interest are state actors." *Jackson*, 419 U.S. at 352 (internal quotation marks omitted). This Court should not deviate from these time-tested principles in this case.

This Court has historically demonstrated a strong aversion to finding that a private entity's administration of its property is a "public function." In *Marsh v. Alabama*, 326 U.S. 501 (1946), for example, the Court held that because a privately-owned

"company town" shared "all the characteristics of any other American town" the First Amendment applied just as it would to a publicly-owned town or city. *Id.* at 505. But subsequent decisions interpreting *Marsh* have made clear that private property can "be treated as though it were public" for purposes of the public function test *only if* "that property has taken on all the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated.'" *Flagg Bros.*, 436 U.S. at 159 (quoting *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting)). This strict state action analysis does not change if "the public is generally invited to use [the private property at issue] for designated purposes." *Lloyd Corp. v. Tanner*, 407 U.S. 551, at 569 (1972); *see also* Petitioner's Brief at 5, 20. Indeed, as this Court has noted:

> Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes. The only fact relied upon for the argument that [the private] parking lots have acquired the characteristics of a public municipal facility is that they are 'open to the public.' Such an

> argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would . . . constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments.

Central Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972)

Public access channels have not "taken on *all* the attributes of a town." *Flagg Bros.*, 436 U.S. at 159 (emphasis added). They provide an important public service and are a vital outlet for free expression. But they do not "assume to some significant degree the functional attributes of public property devoted to public use." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972). Accordingly, this case presents no occasion to expand the kinds of spaces where a private entity's operation of private property is subject to constitutional scrutiny under the "public function" test.

Respondents appear to agree that this case is not an easy fit for the traditional "public function" test. Instead, Respondents seek to collapse the public forum and the "public function" tests by arguing that the "public function" that MNN provides is its management and oversight of a public forum. BIO at 1 ("Petitioners do not seriously dispute that, if New York's public access channels are public forums, petitioners' regulation of them is state action. Indeed, that point is elementary. If a municipality delegates administration of its public sidewalks to a nonprofit

corporation, regulation of those sidewalks is still bound by the First Amendment."); *see also* Petitioner's Br. at 23-24 (explaining that there is no precedent for skipping the state action inquiry prior to evaluating whether property is a public forum). Judge Lohier applied the same analysis in his concurring opinion below. *See Halleck*, 882 F.3d at 308 (arguing that a "private entity's regulation of speech in a public forum is a public function when the State has expressly delegated the regulatory function to that entity") (Lohier, J., concurring). But neither Respondents nor Judge Lohier cite *any* cases from this Court to support their contention that control of a public forum by a private entity, absent considerable government control or oversight, is an exclusive state function for purposes of the "public function" test.[6] This, of course, is not

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[6] Respondents suggest that *Marsh v. Alabama*, 326 U.S. 501 (1946) and *Evans v. Newton*, 382 U.S. 296 (1966) support this claim. BIO at 21. But *Marsh* stands solely for the proposition that private property can "be treated as though it were public" for purposes of the "public function" test only where "that property has taken on all the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated.'" *Flagg Bros.*, 436 U.S. at 159 (quoting *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting)). And *Evans*, which held that the operation of a privately-owned park was an "exclusively public function," "rests on a finding of ordinary state action under extraordinary circumstances"—namely the fact that transfer of a public park's title to private trustees had "not been shown to have eliminated the actual involvement of the city in [its] daily maintenance and care." *Id.* at 159 n.8; *see also Evans*, 382 U.S. at 301 (explaining that "[s]o far as this record shows, there has been no change in the municipal maintenance and concern over this facility" and that "[i]f the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment"); *Utah Gospel Mission*

surprising, given that public forum analysis is traditionally applied only to determine whether a "*governmental entity*, in regulating property in its charge, may place limitations on speech." *Christian Legal Soc'y*, 561 U.S. at 679 (emphasis added).

In any event, it is essential to recognize that Respondents' and Judge Lohier's novel "public function" test carries with it a critical antecedent question: whether the space at issue is, in fact, a public forum. If, as Respondents argue, "[a]dministering public forums is a public function," then it is first necessary to consider whether the property in question is a public forum. BIO at 21. But as the foregoing discussion of public forum doctrine makes clear, *see supra* at 6-7, the only way to answer this antecedent question is to determine whether a private entity has been delegated ownership or control over government property; whether the government has effectively stepped into the shoes of the private entity under some formal legal arrangement; or

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v. Salt Lake City Corp., 425 F.3d 1249, 1254-56 (10th Cir. 2005) (noting that "*Evans* has since been limited to the unique facts involved"). Indeed, the Court's reliance on the government's continued involvement in the management of the park at issue in *Evans* has led many courts—including this one—to associate it with the "entwinement" state action test, rather than this Court's "public function" precedents. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001) (distinguishing between "public function" test and "entwinement" test and associating *Evans* with the latter); *see also Gonzalez-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d 244, 248 (1st Cir. 2012) (associating *Evans* with this Court's "entwinement doctrine"); *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 815-16 (7th Cir. 2009) (same).

whether a private entity oversees private property that is so controlled or regulated by the government that it can be deemed a public forum. Nothing about Respondent's or Judge Lohier's proposed "public function" test lowers this already-high bar for whether private property qualifies as a public forum in the first place.

III. THERE ARE SERIOUS ADVERSE CONSEQUENCE TO TREATING INTERNET COMPANIES AS STATE ACTORS

As noted, Internet Association takes no position on whether MNN is a state actor. It does, however, wish to emphasize the profound impact that any determination that Internet companies are state actors would have on these companies. These consequences demonstrate why this Court should be especially careful in crafting any state action ruling in these narrow circumstances.

A. An Unintentionally Broad Ruling That Treats Private Companies as State Actors Would Transform the Modern Internet

Imposing the First Amendment's strictures on private actors like *amicus curiae*'s members would result in a radical transformation in the content and caliber of the services provided by modern Internet companies. While it is impossible to predict the full range of consequences such a radical change would wreak on the Internet, two would be unavoidable.

First, the Internet as we know it will become less attractive, less safe, and less welcoming to the average user. "'From 1791 to the present' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992)). Those "'well-defined and narrowly limited'" areas include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.* at 468-469 (listing cases and quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Outside of this handful of categories, "[i]t is *rare* that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000) (emphasis added).

If deemed to be state actors, Internet companies would, under blackletter First Amendment law, be barred from removing or limiting access to videos that contain nudity,[7] profanity and expletives,[8] hate speech,[9] or depictions of animal cruelty.[10] Attempts to restrict videos that advocate non-imminent violence or other lawless action;[11] "demean[] on the basis of race, ethnicity, gender, religion, age, disability, or any other similar

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[7] *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975).

[8] *Cohen v. California*, 403 U.S. 15, 18 (1971).

[9] *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

[10] *Stevens*, 559 U.S. at 482.

[11] *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

ground,"[12] contain content on matters of public concern that nonetheless "inflict great pain" or emotional distress on others,[13] or constitute cyberbullying[14] would be similarly impermissible. As a result, Internet companies could not enforce their community standards or make their own editorial choices about what content to exclude from their websites to best serve and protect their users.

Second, if this Court were to determine that Internet companies are state actors, it will impose a significant penalty on private actors that make their services available to third parties for the expression and exchange ideas. Social media websites and other Internet businesses did not become "the most important places (in a spatial sense) for the exchange of views" by accident. *Packingham*, 137 S. Ct. at 1735. To be sure, the Internet inherently offers a

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[12] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (opinion of Alito, J.); *see id.* at 1766-67 (opinion of Kennedy, J.) ("The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience . . . .[T]he Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[13] *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (finding the following placards, placed at a military service member's funeral, to be protected by the First Amendment: "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Fags Doom Nations," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys").

[14] *New York v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014); *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016).

"relatively unlimited, low-cost capacity for communication of all kinds," and those realities have contributed to the Internet's openness. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). But it is equally crucial that the owners and operators of the leading Internet businesses were—and are—committed to promoting expression in a manner consistent with their terms of service and other community norms. Treating these companies as state actors would, in effect, penalize them precisely because of their prior success in creating vibrant and welcoming online communities. This would create a powerful disincentive for future innovators. Other companies would now think twice before allowing users "to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Packingham*, 137 S. Ct. at 1735-36 (citing *Reno*, 521 U.S. at 870).

Put simply, an Internet where companies are treated as state actors is a very different Internet from the one that exists today. It is an Internet where individual businesses must be *less* responsive to community norms and consumer demands, and where these individual businesses are forced to be *less* safe for children and families. And it is an Internet with *less* of a self-directed commitment to free expression. *Amicus curiae* respectfully submit that this Court should consider these consequences as it crafts its decision in this case.

B. A Determination That Private Internet Companies Are State Actors Would Violate Those Actors' First Amendment Rights

MNN does not exercise editorial control over the public access channel it oversees. *Halleck v. City of NY*, 224 F. Supp. 3d 238, 240 (S.D.N.Y. Dec. 13, 2016) (citing 16 N.Y. Comp. Codes R. & Regs. tit. 16 §§ 895.4(c)(8)-(9), which prohibits "editorial control" except for "measures as may be authorized by Federal or State law to prohibit obscenity or other content unprotected by the First Amendment"). By contrast, the vast majority of Internet companies exercise some meaningful measure of editorial control over their websites. The First Amendment implications of holding that MNN is a state actor are therefore dramatically different from treating Internet companies as state actors.

Courts have routinely held that online services receive First Amendment protection for their

editorial choices.[15] This conclusion ineluctably follows from three well-established constitutional principles that the Supreme Court distilled in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). *First*, "since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley*, 515 U.S. at 573 (internal citations and quotation marks omitted). *Second*, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices." *Id.* at 569. Put differently, the First Amendment does not "require a speaker to generate, as an original matter, each item featured in the communication." *Id.* at 570. This Court has, for example, recognized that cable operators engage in protected speech "even when they only select programming originally produced by others," and newspapers receive First Amendment protection for their selection of opinion authors and advertisers in their publications. *Id.* *Third*, these bedrock constitutional protections are not "restricted to the

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[15] *E.g.*, *Robinson v. Hunt Cty., Texas*, 2017 WL 7669237, at *3 (N.D. Tex. Dec. 14, 2017) ("Facebook has a right to exercise control over the contents of its platform."); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (Facebook has a "First Amendment right to decide what to publish and what not to publish on its platform"); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017) (owner of a website has a "First Amendment right to distribute and facilitate protected speech"); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014) (attempt to hold an Internet service liable for "its editorial judgments . . . cannot be squared with the First Amendment").

press." *Id.* at 574. They are "enjoyed by business corporations generally." *Id.*

Given these straightforward and firmly-established principles, Internet companies have a First Amendment right to make editorial choices on their websites. As a consequence, a decision holding or implying that these organizations are state actors would not only run counter to this Court's state action standards, but also abridge these services' First Amendment rights.

IV. ANY RULING IN THIS CASE SHOULD BE AN EXCEEDINGLY NARROW ONE, INFORMED BY THE LEGAL PRINCIPLES AND PRACTICAL CONSEQUENCES SET FORTH ABOVE

Courts have repeatedly emphasized that determining whether a private entity should be subject to constitutional scrutiny is a "*necessarily* fact-bound inquiry." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982); *see also Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1045 (9th Cir. 2018) (noting that "determining whether a location is properly categorized as a public forum involves largely factual questions"). And the facts here are clear. The Cable Communications Policy Act of 1984 "authorizes cable franchising authorities to require for franchise renewal 'that channel capacity be designated for public, educational, or governmental use.'" *Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300, 302 (2d Cir. 2018) (quoting 47 U.S.C. § 531(b)). New York, in turn, "requires that every franchisee of [certain] cable television station[s] . . . shall designate . . . at least one full-time activated channel for public

access use." *Halleck v. City of NY*, 224 F. Supp. 3d 238, 240 (S.D.N.Y. 2016) (quoting N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(b)(1)). This public access channel must be made available to the public "on a first-come, first-served, nondiscriminatory basis." *Ibid.* (quoting N.Y. Comp. Codes R. & Regs. tit 16, § 895.4(a)(1)). As a condition of Time Warner's cable franchise with New York City, MNN was appointed by the Manhattan Borough President to administer its public access channels. *Ibid.* And MNN is prohibited from exercising any editorial control over this channel, with the exception of taking measures to "prohibit obscenity or other content unprotected by the First Amendment." *Ibid.* (quoting N.Y. Comp. Codes R. & Regs. tit 16, §§ 895.4(c)(8)-(9)).

These features were central to the decision below. As the Second Circuit explained:

> where, as here, federal law authorizes setting aside channels for public access to be "the electronic marketplace of ideas," state regulation requires cable operators to provide at least one public access channel, a municipal contract requires a cable operator to provide four such channels, and a municipal official has designated a private corporation to run those channels, those channels are public forums . . . [and because MNN employees] are not interlopers in a public forum . . . [and instead] are exercising precisely the authority to administer such a forum conferred on them by a senior municipal

> official [the First Amendment applies to their actions]

Halleck, 882 F.3d at 306-307.

Critically, Respondents agree that this case turns on these highly specific facts. It argues that MNN is subject to constitutional scrutiny because (1) New York's public access channels are available to the public on a first-come, first-served basis and are intended to create a forum for expressive activity; (2) MNN cannot assert editorial control over the content displayed on these channels; and (3) New York City created the channels at issue. *See* BIO at 23-25 ("This conduct *taken together*, evinces New York City's unmistakable intent to designate its public access channels as public forums.") (emphasis added). The court below and the parties in this case are therefore in accord that if this Court holds that MNN is a state actor, the unique set of facts at issue here warrants a correspondingly limited holding.

This regulatory structure presents a vivid contrast to Internet companies' role in building and managing their online services. Neither federal nor state law has mandated the creation of any of Internet Association's members—or, for that matter, any relevant private online service. These companies are privately-owned, and the government does not play a comparable role in their oversight or regulation. Unlike MNN, moreover, these companies can control both the users who are permitted to access their sites, as well as the community standards that users must adhere to. Consequently, Internet Association merely asks the Court to make clear that any holding regarding public access channels *cannot* apply to

Internet services, and any finding of state action in this case sheds *no* light on whether Internet companies are subject to constitutional scrutiny. *See* BIO at 35 ("[S]ocial media [and other internet services are] nothing like petitioner MNN."). *But see* Petitioner's Br. at 57 ("[I]f MNN's minimal nexus to the government is sufficient to find state action, then entities such as . . . Facebook [and] Twitter . . . —all of which are subject to some level of governmental regulation—should be concerned."). In so doing, the Court should reaffirm its commitment to the view that, absent extraordinary governmental involvement in the control of a private space or a private entity's assumption of all of the functions of a municipality, neither the public forum nor "public function" doctrines extend to private property operated by a private entity.

V. CONCLUSION

For the foregoing reasons, this Court should carefully limit its opinion to the unique facts of this case and make clear that a private entity's operation of private property will only rarely be subject to constitutional scrutiny.

Respectfully submitted,

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No. 17-1702

IN THE
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute") is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

The Institute is particularly committed to protecting the integrity and vitality of online forums in which citizens communicate with each other and with their elected representatives about matters of public concern. The Institute has represented plaintiffs in two First Amendment challenges to government officials' practice of blocking critics from social media accounts used for official purposes. *Davison v. Randall*, Nos. 17-2002, 17-2003, 2019 WL 114012 (4th Cir. 2019), *as amended* (Jan. 9, 2019) (holding that a local government official violated the First Amendment when she blocked a Virginia resident from her official Facebook Page); *Knight First Amendment Inst. at Columbia Univ. v. Trump*,

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[1] *Amicus* has provided timely notice to counsel for all parties and has received their written consent. Sup. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the prepration or submission of the brief. Sup. Ct. R. 37.6.

302 F. Supp. 3d 541 (S.D.N.Y. 2018) (holding that President Donald Trump and his aide violated the First Amendment by blocking users from the @realDonaldTrump Twitter account), *appeal filed*, No. 18-1691 (2d Cir. 2018).

SUMMARY OF ARGUMENT

Amicus Knight First Amendment Institute at Columbia University respectfully submits that this Court should affirm the judgment below for the narrow and fact-specific reasons set forth in the respondents' brief. The Knight Institute is filing this brief to address a question that is not directly presented by the parties' main arguments, but that the Court might have to consider in its resolution of this case: whether and when the public forum doctrine applies to expressive spaces established by government actors on private property. Another *amicus*—the Chicago Access Corporation—encourages the Court to hold that the public forum doctrine has no application except to property owned outright by the government or in which the government has a property interest. For the reasons discussed below, the Knight Institute submits that the Court should not abandon its flexible approach to public forum doctrine in favor of this rigid rule. Adopting it would have deleterious and far-reaching implications for the integrity and vitality of expressive spaces that are increasingly important to our democracy in the digital age.

The public forum doctrine has long served to safeguard government-established expressive spaces against government censorship and

distortion. The Court has recognized that the principles underlying the doctrine apply not only to parks and sidewalks but also to other spaces that the government intentionally opens up to the public for expressive activity. Thus, the Court has protected speech against government censorship in designated public forums as well as in traditional ones. Likewise, the Court has held that the doctrine applies not just to physical spaces but to "metaphysical" spaces as well. In each of these contexts, the Court has focused on the nature and function of the forum.

Today, government actors are increasingly harnessing the power of the Internet and social media to establish new expressive spaces that function as digital analogs to traditional town halls and public squares. These government-controlled digital forums are critical to public discourse, but they reside or rely on communications networks that are, as a general matter, privately owned.

The Court should decline the invitation to adopt a rigid rule that the public forum doctrine is inapplicable unless the government holds a formal property interest in the space at issue. Adopting that rule would require the Court to overrule or significantly narrow longstanding precedent, would allow government actors to easily evade the First Amendment's restrictions in spaces that are central to public discourse, and would be difficult or impossible for courts to apply online, where property rights are often ill-defined.

The Court should ensure that its public forum doctrine continues to safeguard these government-controlled spaces—which are so important to our democracy—against government censorship and distortion.

ARGUMENT

I. Government actors increasingly establish expressive forums for public discourse on privately owned communications infrastructure.

An ever-increasing amount of public discourse now takes place online. As Justice Kennedy noted two decades ago, "[m]inds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Today, the "most important places . . . for the exchange of views" are "the 'vast democratic forums of the Internet' in general . . . and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997)) ("Seven in ten American adults use at least one Internet social networking service.").

The government has moved online, too. *See, e.g.*, Jacob R. Straus, Cong. Research Serv., R45337, *Social Media Adoption by Members of Congress:*

Trends and Congressional Considerations 1 (2018), https://perma.cc/3XEG-78ZR ("Many Members [of Congress] now use email, official websites, YouTube channels, Twitter, Facebook, Instagram, Flickr, Google+, Medium, and other networking platforms to share information with and collect information from their followers."). In many contexts, government actors speak and associate online in much the same way that private citizens do. In other contexts, however, government actors establish official spaces online for expression by private citizens—digital analogs to town halls and public squares.

Thus, government websites sometimes include interactive blogs through which agencies describe and explain their policies and invite and enable citizens to post comments and questions in response. For example, the Transportation Security Administration's official website hosts a comment-enabled blog whose stated "purpose . . . is to communicate with the public about all things TSA related." Transp. Security Admin.: TSA Blog, https://perma.cc/4RMU-93MX; *see also, e.g.*, Fed. Trade Commission: FTC Blogs, https://perma.cc/8N6Q-JTG3 (hosting twin "business" and "consumer" blogs that allow for comments); Fed. Comm. Commission: FCC Blog, https://perma.cc/LSZ2-M9KE; U.S. Dep't of Veterans Affairs: VAntage Point, http://perma.cc/85YN-6X3D.

Government actors also host virtual town halls—online or by phone—to interact with the public. *See, e.g., 21st Century Town Hall Meetings*, Cong. Mgmt.

Found., http://perma.cc/N9A4-A4FC. Some elected officials have adopted these "tele-town halls" as a primary means of interacting with their constituents, *see, e.g.*, Tom Troy, *Tele-Town Halls: Latta Connects via Phone in lieu of In-Person Events*, Toledo Blade (May 7, 2017), http://perma.cc/D99H-ARVZ (identifying elected officials for whom tele-town halls have become "regular practice"), while others rely on tele-town halls when in-person meetings are not feasible, *see, e.g.*, Shane Goldmacher, *Schumer Misses Town Hall in Brooklyn, but Still Feels the Heat*, N.Y. Times (July 3, 2018), https://perma.cc/RGQ3-QUFF (discussing New York Senator Chuck Schumer's decision to host a conference call for his constituents after he was unable to attend a planned in-person town hall meeting).[2]

Social media has become a particularly rich environment for public discourse, and government actors now routinely establish expressive forums on social media platforms to allow them to communicate with their constituents about government-related matters, and to allow their constituents to communicate with them and with each other. *See, e.g.*, *U.S. Digital Registry*, DigitalGov, http://perma.cc/5KRQ-FBBM (last

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[2] Many private companies specialize in providing tele-town hall services, allowing government representatives, typically elected officials, to speak to and hear from members of the public via remote audio or video conferencing. *See, e.g.*, Access Live, http://perma.cc/MY5J-S34F; iConstituent, http://perma.cc/L46L-PJ2K; Tele-Town Hall, http://perma.cc/R6NK-QACE.

updated July 25, 2018) (providing a database of thousands of registered federal government social media accounts); *cf. Packingham*, 137 S. Ct. at 1735–36 (explaining that social media platforms provide critical opportunities for members of the public "to engage in a wide array of protected First Amendment activity"). These digital forums "enable innovative forms of public participation and engagement," Ines Mergel, Social Media in the Public Sector 3 (2013), allowing "governments to gather information from citizens, to listen to their needs and interests, and to respond directly to them quickly and efficiently." Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. Rev. 1975, 2007 (2011); *see also Packingham*, 137 S. Ct. at 1735 ("[U]sers can petition their elected representatives and otherwise engage with them in a direct manner.").

Many officials create Facebook "Pages" for these purposes.[3] *See, e.g., Davison v. Randall*, Nos. 17-2002, 17-2003, 2019 WL 114012, at *7 (4th Cir. 2019), *as amended* (Jan. 9, 2019) (finding that a local government official used her Facebook Page "as a tool of governance"); *Leuthy v. LePage*, No. 17 Civ. 296, 2018 WL 4134628, at *4 (D. Me. Aug. 29, 2018) (describing the Facebook Page created and controlled by Maine Governor Paul LePage and his staff). Some government officials also host virtual town halls over Facebook "Live," Facebook's video streaming service. *See, e.g.*, John McCain (@johnmccain), Facebook (Mar. 23, 2017),

[3] Facebook Pages are designated spaces where "public figures" can "share their stories and connect with people." *How Do I Create a Page?*, Facebook, http://perma.cc/9W3P-B6V7.

http://perma.cc/D4UX-HP3E (town hall hosted by the late Arizona Senator John McCain on Facebook Live).

Other government officials use Twitter accounts to "tweet" messages to the public, and to allow those who "follow" their accounts to reply to their tweets and reply to others' replies. *See, e.g.*, *Packingham*, 137 S. Ct. at 1735 (noting widespread use of Twitter among members of Congress and "Governors in all 50 States"); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 552–54 (S.D.N.Y. 2018) (describing President Donald Trump's use of his @realDonaldTrump Twitter account for matters relating to government); *FTC Social Media Chats*, Fed. Trade Commission, http://perma.cc/K3LE-CAY5 ("The FTC hosts or participates in Twitter chats . . . . Chats are open to the public and everyone is encouraged to participate."); Justin Herman, *Twitter Chat Guidance for Federal Agencies*, DigitalGov (Oct. 16, 2013), http://perma.cc/YW77-CCEH ("Many agencies across government have used Twitter town halls and chats for years to bring their mission directly to the public by answering questions, soliciting feedback, or collaborating on ideas.").

Government actors also participate in live video conferencing with constituents through Google "Hangouts." *See, e.g.*, Kelly Mae Ross, *Members Warming to Google Hangouts*, Roll Call (Nov. 11, 2013), http://perma.cc/BE5L-WT2Q. Some upload videos to and livestream events on YouTube, where they solicit user comments in response. *E.g.*, NASA, *Community*, YouTube https://perma.cc/J622-3N4Z.

Others answer uncensored questions from Reddit users in "Ask Me Anything" comment threads. *E.g.*, *I'm Rep. Beth Fukumoto, Former Republican, Current Independent, Prospective Democrat*, Reddit (Apr. 12, 2017), http://perma.cc/9W22-ZHDV (Hawaii state representative Beth Fukumoto providing more than two dozen responses to substantive questions on U.S. policy and politics).

These expressive spaces are diverse in their purposes and configurations, but collectively they are increasingly vital to our democracy, providing significant sources of information, and venues for debates, about government. More and more, these interactive spaces are where public discourse takes place. *See* Lidsky, *supra*, at 2003 (stating that public officials are using social media because "that's where the citizens are"); *see also* Mergel, *supra*, at 14–15 (reporting that the majority of government social-media officers interviewed agreed that they used social media because "[w]e have to be where the people are if we want to reach them" (citation omitted)). By taking advantage of these digital-age opportunities for public engagement, government actors create new and important opportunities for First Amendment-protected expression.

Crucially, however, all of these spaces are dependent on privately owned communications infrastructure. Facebook, Google, Twitter—these are all private companies. *See* John D. Inazu, *Virtual Assembly*, 98 Cornell L. Rev. 1093, 1128 (2013) ("[T]he vast majority of speech on the Internet today occurs within private places and spaces that are owned and regulated by private entities."); Alissa

Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 Admin. L. Rev. 301, 313 (2013) ("[P]ublic space online is next to non-existent.").

Indeed, online, even spaces that are government-owned are almost always dependent on private intermediaries, such as web-hosting companies and content-distribution networks. *See, e.g.*, Rebecca MacKinnon et al., United Nations Educ., Sci. & Cultural Org., Fostering Freedom Online: The Role of Internet Intermediaries 21–24 (2014), http://perma.cc/X8P8-QK6V (categorizing the "services and platforms that host, give access to, index, or facilitate the transmission and sharing of content" on the Internet); David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 377 (2010) ("[The Internet] is layered on privately owned Web sites, privately owned servers, privately owned routers, and privately owned backbones."). Many of the most important spaces for expression in the digital age—including spaces that are established and hosted and regulated by the government—rely on privately owned communications infrastructure.

II. This Court's public forum doctrine safeguards public discourse in government-controlled expressive spaces that are crucial to democracy.

This Court has made clear that the public forum doctrine applies to expressive spaces that the

government either owns or controls, "[w]herever the title . . . may rest." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). The application of the doctrine to spaces that the government owns or controls reflects the doctrine's underlying purpose, which is to prevent government distortion of public discourse in spaces that are critical to democratic self-government. As public discourse moves online, it is crucial that the Court continue to apply the public forum doctrine to digital spaces that "share essential attributes" of offline public forums, *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009), when those spaces are owned or controlled by the government.

This Court's public forum doctrine has long served to ensure that government-established spaces which are indispensable to public discourse and democratic self-government are "free[] from government manipulation." Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 Sup. Ct. Rev. 79, 93 (emphasis omitted). As the Court has recognized, "[t]here is an 'equality of status in the field of ideas,'" and the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 & n.4 (1972) (quoting Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948)).

Appropriately, the Court's public forum jurisprudence has focused principally on the function served by the expressive space in question.

See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (explaining that the "existence" of a public forum "depend[s] on the character of the property at issue"). The Court has applied the doctrine not only to "traditional public forums," such as streets or parks, that have "immemorially been held in trust for the use of the public," *id.* at 45 (quoting *Hague*, 307 U.S. at 515), but also to "designated public forums," nontraditional "place[s] or channel[s] of communication" opened up by the government for expressive activity, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985), that "share essential attributes of a traditional public forum," *Pleasant Grove City*, 555 U.S. at 469.[4]

The Court has also applied the doctrine to spaces that "lack[] a physical situs," *Cornelius*, 473 U.S. at 801; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (noting that public forums may be "metaphysical" as well as "spatial or geographic"), reflecting the Court's recognition that First Amendment protections against censorship must apply with full force in any forum, including nontraditional forums, that the government establishes for the purpose of open public debate.

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[4] These "essential attributes" include whether the space: is "generally open to the public," *Widmar* v. *Vincent*, 454 U.S. 263, 268 (1981); is "designed for and dedicated to expressive activities," *Se. Promotions, Ltd.*, 420 U.S. at 555; or has as "a principal purpose . . . the free exchange of ideas." *Cornelius*, 473 U.S. at 800.

Consistent with its focus on protecting speech in government-established spaces, the Court has applied the public forum doctrine not only to expressive spaces established on government-owned property, but also to those established on government-controlled property that is privately owned.

In *Southeastern Promotions, Ltd. v. Conrad*, the Court held that a "privately owned . . . theater under long-term lease to the city" was a First Amendment-protected public forum. 420 U.S. 546, 547, 552, 555 (1975). The Court observed that the theater was "designed for and dedicated to expressive activities." *Id.* at 555; *see also Cornelius*, 473 U.S. at 803 ("[T]he Court found a public forum where a municipal auditorium and a city-leased theater were designed for and dedicated to expressive activities." (citing *Se. Promotions, Ltd.*, 420 U.S. at 555)). The Court also highlighted that the municipality held "the power to deny use of a forum in advance of actual expression." *Id.* at 553; *see also id.* at 564 ("[A]ny system which permits governmental officials to inhibit or control the flow of disturbing and unwelcome ideas to the public threatens serious diminution of the breadth and richness of our cultural offerings."). Although the Court's opinion did not separately address the theater's ownership, the fact that a private landlord owned the theater did not prevent the Court from holding that the space—which the government opened to the public for expressive activities and to which the government controlled access—was a public forum under the First Amendment.

Since *Southeastern Promotions*, the Court has characterized the relevant inquiry as "whether a particular piece of personal or real property owned *or controlled* by the government is in fact a 'public forum.'" *U.S. Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981) (emphasis added);[5] *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 (2010) ("[I]n a progression of cases, this Court has employed forum analysis to determine when a governmental entity, *in regulating property in its charge*, may place limitations on speech." (emphasis added)); *Cornelius*, 473 U.S. at 801 (noting that public forum analysis applies to "public property or *private property dedicated to public use*" (emphasis added)). Just this past term, the Court referred again to the "three types of *government-controlled* spaces:

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[5] In *U.S. Postal Service*, the Court considered the contention that private mailboxes should be deemed public forums. 453 U.S. at 128–31. While it rejected the argument, it did so not (as *amicus* Chicago Access Corporation suggests) because the government lacked formal property rights in the mailboxes, but because the mailboxes were not expressive spaces to which the plaintiff civic groups had any right of access. *Id.* at 128–29. *Contra* Brief for Amicus Curiae Chicago Access Corp. in Support of Petitioners at 21, No. 17-1702 (U.S. Dec. 11, 2018) (citing *U.S. Postal Service* for the incorrect assertion that the Court "has declined to treat as a public forum private property over which the government has *control* but no formal property rights"). The Court wrote that it found it "difficult to conceive of any reason" to "treat a letterbox differently for First Amendment access purposes than it has in the past treated" property that the government clearly owns outright, such as "the military base . . . , the jail or prison . . . , or the advertising space made available in city rapid transit cars." *Id.* at 129–130 (citations omitted).

traditional public forums, designated public forums, and nonpublic forums." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (emphasis added).

In a diversity of contexts, lower courts have similarly applied the public forum doctrine to spaces controlled by the government but not owned by it. *See, e.g., United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748–51 (6th Cir. 2004) (applying public forum analysis to government officials' exclusion of union members from public and private property near polling stations); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir. 2002) (applying public forum analysis to a public easement over a privately owned street and noting that "forum analysis does not require that the government have a possessory interest in or title to the underlying land"); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491, 494–95 (7th Cir. 2000) (applying public forum analysis to a section of a formerly public park sold to a private fund).

Recently, lower courts have applied the public forum doctrine to social media accounts and pages controlled by government actors and used for official purposes. For example, in *Davison v. Randall*, the Fourth Circuit addressed a First Amendment challenge to a local government official's blocking of a critic from her official Facebook Page. The court held that the "interactive components" of the Page—that is, the sections in which members of the public post their own comments—constituted a public forum because the defendant "retained and exercised significant control over the page." *Davison*,

2019 WL 114012, at *10. Similarly, in *Knight First Amendment Institute at Columbia University v. Trump*, the district court held that President Donald Trump and his aide violated the First Amendment by blocking critics from the @realDonaldTrump Twitter account because, "[t]hough Twitter is a private . . . company that is not government-owned, the President and [his aide] nonetheless exercise control over various aspects of the @realDonaldTrump account." 302 F. Supp. at 566–67. These courts have correctly recognized that the First Amendment protects individuals against government censorship in social media spaces that are controlled by government officials and opened to the public, even if the social media platforms are privately owned.[6]

III. A rigid property-based rule would risk categorically foreclosing application of the public forum doctrine to expressive spaces online.

As public discourse moves online, it is crucial that the Court continue to apply the public forum doctrine to spaces that "share essential attributes" of a public forum, *Pleasant Grove City*, 555 U.S. at 469, whether those spaces are owned by the government or simply controlled by it. Government censorship and manipulation in a government-regulated expressive space inflicts the same injury

[6] To say that the First Amendment forbids the government from engaging in viewpoint-based discrimination in these spaces is not to say that the private owners of the spaces can be held liable under the First Amendment.

on public discourse, and on the mechanisms of self-government, whether the expressive space is owned or controlled by the government. Applying the public forum doctrine to expressive spaces on property that is government controlled but not government owned is necessary to prevent government manipulation of public discourse in the expressive spaces in which speech crucial to our democracy increasingly takes place.[7]

Amicus Chicago Access Corporation proposes that the Court replace a flexible inquiry into the extent and nature of government control with a rigid rule that would foreclose application of the public forum doctrine to "private property in which the government holds no formal [property] interest." *See* Brief for Amicus Curiae Chicago Access Corp. in Support of Petitioners, *supra*, at 2–3, 16–22; *see also Denver Area*, 518 U.S. at 826–31 (Thomas, J., concurring in the judgment in part and dissenting in part) (maintaining that the Court should "limit[] the government's ability to declare a public forum to property the government owns outright, or in which the government holds a significant property interest

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[7] Public officials retain their own First Amendment rights, of course, and the public forum doctrine does not transform every expressive space established by a public official online into a public forum under the First Amendment. Whether any particular expressive space online should be deemed a public forum will turn not only on who established the space but also on how the space is used. *See, e.g.*, *Davison*, 2019 WL 114012, at *1 (distinguishing a local government official's "official" Facebook Page—which the court held was a public forum—from the official's "personal profile and a Page devoted to her campaign").

consistent with the communicative purpose of the forum to be designated").

The Knight Institute respectfully submits that narrowing the public forum doctrine in this way would be a mistake. That the government possesses a property interest in a particular space will of course be *relevant* to whether that space should be deemed a public forum. But foreclosing the possibility of public forums on property in which the government does not possess such an interest would be problematic for multiple reasons.

As an initial matter, a rule that turned solely on property rights would be impossible or impracticable to apply to digital-age technology, which has disrupted settled property law paradigms. *See Knight First Amendment Inst.*, 302 F. Supp. at 566 (explaining that a "requirement of governmental control . . . better reflects that a space can be 'a forum more in a metaphysical than in a spatial or geographic sense,' . . . and may 'lack[] a physical situs,' . . . in which case traditional conceptions of 'ownership' may fit less well" (quoting *Rosenberger*, 515 U.S. at 830; *Cornelius*, 473 U.S. at 801)). The precise contractual or property interests held by government actors using privately owned communications networks are often ill-defined. A single social media account or page, for example, "encompasses a web of property rights." *Davison*, 2019 WL 114012, at *9 n.4.

More fundamentally, a rule that focused solely on property rights would make it easy for government actors to evade the First Amendment's protections.

Cf. Freedom from Religion Found., Inc., 203 F.3d at 491 ("[A]dherence to a formalistic standard invites manipulation"). Government actors could opt out of constitutional commands simply by choosing to host town halls and city council meetings not on government property but in private facilities across the street. Or they could opt out of the same First Amendment commands by hosting forums for their constituents online rather than offline. There would be no logic to such a rule. As the Fourth Circuit recently asked, "why should a municipality be allowed to engage in viewpoint discrimination when holding a virtual public meeting hosted on a private website when such discrimination would be unconstitutional if the meeting was held in a governmental building?" *Davison*, 2019 WL 114012, at *11.

Thus, an abandonment of the Court's more flexible approach to the public forum doctrine in favor of a more rigid one focused solely on property rights would have far-reaching implications for digital-age expressive forums that are increasingly important to our democracy. Such a rule would call into question the application of the public forum doctrine to government-controlled social media pages and tele-town halls, because these forums exist on communications infrastructure that is privately owned. It would also call into question the application of the doctrine to government blogs, since those blogs are usually hosted by and transmitted through privately owned intermediaries. In these spaces, government officials would be free to censor speakers on the basis of their criticism of government policy, to manipulate debate

in other ways, and to transform what might have been dynamic and generative expressive forums into echo chambers. *Cf.* Ardito, *supra*, at 304 ("A new forum for citizen participation may be subverted into an arena for acclamation."). And it would sacrifice the integrity and vitality of public discourse in these spaces for no obvious compensating benefit for the government, the property owners, or the public.[8]

The prospect of government censorship and distortion of these important digital spaces is not merely speculative. Indeed, there is already ample evidence that "[g]iving government free rein to exclude speech it dislikes by delimiting public for a . . . would have pernicious effects in the modern age." *Denver Area*, 518 U.S. 727, 802–03 (1996) (Kennedy, J.).

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[8] Adopting a property-based rule would have broad implications for speech offline as well. Elected officials frequently hold open town halls in a wide array of privately owned *physical* spaces—including non-profit community centers, retirement homes, places of worship, coffeeshops, and restaurants—without first acquiring an interest in the property. *See, e.g.*, Beto O'Rourke (@BetoORourkeTX16), *November Town Hall*, Facebook (Nov. 17, 2018), https://perma.cc/WSP8-PQ8T?type=image (publicizing a general town hall for constituents hosted by Texas Representative Beto O'Rourke at the El Paso Community Foundation, a private non-profit organization); *Be Involved*, Mike Weissman, State Representative, https://perma.cc/KTD3-E7QM (listing a monthly town hall meeting hosted by multiple Colorado state officials at the Heather Gardens Community Center, a private senior living community). A property-based rule would leave public officials free to ostensibly open these forums to the public at large and then selectively eject citizens whose views they disfavored.

Agencies and officials at all levels of government and across the political spectrum have adopted the practice of blocking or censoring from their social media accounts individuals who disagree with them or criticize their official decisions. *See, e.g.*, Gov. Block Lists Revealed, http://perma.cc/BKB7-9K3K (documenting the results of public records requests to obtain a list of users blocked from government actors' social media accounts); *see also* Brady McCombs, *Politicians Blocking People on Social Media Ignites Debate*, AP News (Aug. 10, 2017), http://perma.cc/L867-U9DB; Charles Ornstein, *Trump's Not the Only One Blocking Constituents on Twitter*, ProPublica (June 7, 2017), http://perma.cc/B3GP-K3H8.

At the federal level, President Donald Trump has blocked his critics from participating in the comment threads associated with his Twitter account, @realDonaldTrump. *See Knight First Amendment Inst.*, 302 F. Supp. 3d at 553–54. Federal agencies—including the Department of Veterans Affairs, Department of Energy, Department of Labor, and the Small Business Administration—have similarly blocked disfavored speakers from their official Facebook Pages and Twitter accounts. *See* Leora Smith & Derek Kravitz, *Governors and Federal Agencies Are Blocking Nearly 1,300 Accounts on Facebook and Twitter*, ProPublica (Dec. 8, 2017), http://perma.cc/NB4Z-JPGH.

At the state and local level, several governors have blocked users from their official social media accounts and pages. *See id*; *see also, e.g.*, *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1006 (E.D. Ky. 2018)

(Kentucky Governor Matt Bevin); 1stamendmnt, *FAC Prompts Disclosure of California Governor Jerry Brown's Social Media 'Block Lists,'* First Amend. Coalition (Sept. 26, 2017), http://perma.cc/WB76-DXYQ (California Governor Jerry Brown). A recent investigative report found that "a quarter of San Diego County's elected officials" have blocked users on Facebook and Twitter. Tom Jones & Nicholas Kjeldgaard, *Local Politicians Blocking Access to Social Media Accounts*, NBC 7 San Diego (June 5, 2018), http://perma.cc/ATG5-TTC9. And a number of local governments have settled First Amendment suits challenging their adoption of policies authorizing the deletion of comments and blocking of users from local agency and elected official social media accounts.[9]

While some of these technologies are still relatively new, it is already clear that, without the

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[9] *See, e.g.*, Samantha Weigel, *San Mateo Updates Twitter Policies in Legal Settlement*, Daily J. (May 20, 2017), http://perma.cc/ZT5A-8V4V (reporting that a settlement reached by the city of San Mateo in a First Amendment and public records suit required the mayor to "unblock his Twitter account"); Cara Anthony, *Beech Grove, ACLU Reach Settlement in Facebook Case*, Indianapolis Star (Aug. 4, 2016), http://perma.cc/7M9X-RWYL (reporting that the city of Beech Grove settled a First Amendment suit for deleting critical comments from the municipal police department's Facebook Page); Andrew Walden, *HPD Ordered to Pay $31K over Censored Facebook Comments*, Hawai'i Free Press (June 27, 2014), http://perma.cc/96PA-QLGC (reporting that the Honolulu Police Department settled a First Amendment over its deleting unfavorable comments and banning users from the Department's Facebook Page).

public forum doctrine, public discourse in government-controlled expressive spaces online would be marked by official suppression and distortion. The public forum doctrine has an important role to play in safeguarding the integrity and vitality of speech in these spaces that are so important to democratic self-government.

CONCLUSION

Amicus respectfully submits that the Court should affirm the judgment below.

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IN THE
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, & CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK & JESUS PAPOLETO MELENDEZ,

Respondents.

On a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMIUS CURIAE[1]

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law-enforcement and detention-facility officials through coordinating and assisting civil-rights lawyers representing their victims. NPAP has approximately six hundred attorney members practicing in every region of the United States. NPAP provides training and support for these attorneys and other legal workers, public education and information on issues related to law-enforcement and detention-facility misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of such misconduct. NPAP supports legislative efforts aimed at increasing law-enforcement and detention-facility accountability and appears regularly as amicus curiae in cases such as this one presenting issues of particular importance for its member lawyers and their clients, who include protesters and victims of police misconduct. NPAP's members regularly represent prisoners and detainees in civil rights litigation.

SUMMARY OF ARGUMENT

Chicago Access Corporation (CAC), amicus curiae supporting the Petitioners, appears to argue for a rule that a party cannot be subject to the Constitution if: (1) the party is not a state official, and (2) the party's

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

challenged conduct violates state law. CAC Amicus Br. at 2, 10. The Court should reject that position. Although this case does not address constitutional limitations on confinement, CAC's argument, if accepted, would have substantial impact on that area of law. CAC's test would contravene settled precedent and have disastrous consequences, unleashing private prison contractors from constitutional restraint whenever they violate state law and the Eighth Amendment simultaneously. Neither the Petitioners nor the Respondents advocates CAC's test.

When prison staff deprive a prisoner of a constitutional right, the same act often breaches state law as well. For example, a guard who savagely beats a compliant prisoner violates state law and the Eighth Amendment with the same conduct. Under CAC's test, if the guard is a contractor rather than a state employee, the Eighth Amendment would not apply to the beating. The contractor has gained an exemption from the Constitution. All he had to do was break state law.

Settled precedent forecloses this proposal. The State cannot contract away its constitutional obligation to refrain from inflicting cruel and unusual punishment. "Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights." *West v. Atkins*, 487 U.S. 42, 56 (1988). The proposition that a party who violates state law does not act under color of state law was conclusively rejected decades ago in *Monroe v. Pape*, 365 U.S. 167, 183–84 (1961).

West involved a prison medical contractor alleged to have provided deficient treatment to an inmate. 487 U.S. at 45. The same conduct would have constituted negligence and malpractice under state law, but that did not matter. *Id.* at 48 n.8. The prison contractor engaged in action fairly attributable to the State. *Id.* at 56–57.

CAC's rule would not only upend *West* but exempt an enormous proportion of prison medical care—and prison conditions more broadly—from the Eighth Amendment. The results would be catastrophic. With prison medical care entirely privatized in 20 States and partially privatized in another eight, a massive share of the prison population would find itself excluded from constitutional protection. And with 8.5% of prisoners incarcerated in institutions managed by contract wardens and patrolled by contract guards, the implications would extend far beyond medical care. Rape and torture by prison guards would not offend the Constitution so long as it violated state law.

This prospect is not a hypothetical parade of horribles. Privatization of prison medical care has often resulted in systematically inadequate treatment. Federal courts enforcing the Constitution have played a critical role in remedying such abuses.

I. THE COURT SHOULD REJECT THE RULE PROPOSED BY CHICAGO ACCESS CORPORATION.

A. The Actions of Private Contractors Performing Correctional Functions Are Fairly Attributable to The State.

1. Settled law establishes that the actions of prison contractors in carrying out constitutional obligations to prisoners are fairly attributable to the State. *See West v. Atkins*, 487 U.S. 42, 55–57 (1988). While a State may entrust some portion of its prison system to a private contractor, the constitutional obligation to avoid barbaric conditions remains.

In *West*, this Court unanimously held that a private medical provider at a North Carolina prison engaged in state action by treating inmates. *Id.* at 55–58. The Court reasoned: "Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights." *Id.* at 56.

Justice Scalia concurred in part and concurred in the judgment in *West*, opining that the Fourteenth Amendment, rather than the Eighth, protects prisoners against deliberately indifferent medical care. *Id.* at 58 (Scalia, J., concurring in part and concurring in the judgment). On the question at hand, he agreed with the majority that "a physician who acts on behalf of the State to provide needed medical attention to a person involuntarily in state custody (in prison or elsewhere) and prevented from otherwise obtaining it," violates the Constitution when the

physician "causes physical harm to such a person by deliberate indifference." *Id.*

The rule of *West*, without more, disposes of this case. A government cannot avoid its constitutional responsibilities by delegating them to someone else. Nothing in Petitioners' argument undermines the holding of *West* or its applicability to the facts herein.

2. The rule of *West* is consistent with the more general body of law on the public function test, which holds that the Constitution extends to state powers "traditionally associated with sovereignty." *Jackson v. Metropolitan Edison Co.*,419 U.S. 345, 353 (1974). As *West* implies, ensuring compliance with constitutional requirements for persons incarcerated by government order is a core public function. *West*, 487 U.S. at 55–56; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55 (1999) (stating that in *West*, "the State was constitutionally obligated to provide medical treatment to injured inmates, and the delegation of that traditionally exclusive public function to a private physician gave rise to a finding of state action" (citing *West*, 487 U.S. at 54–56)). After all, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cty. Dept. of Social Servs.*, 489 U.S. 189, 199–200 (1989).

B. Chicago Access Corporation's Proposal Would Reverse the Established Rule that the Constitution Extends to Prison Contractors.

1. A rule that the conduct of contractors who breach state law cannot be fairly attributed to the

State would upend the settled precedent discussed in the previous section, most notably *West v. Atkins*. The medical contractor in *West* characterized the respondent's claim as state law "negligence" or "medical malpractice," arguing the petitioner's allegations fell short of deliberate indifference, the higher standard of fault required by the Eighth Amendment. 487 U.S. at 48 n.8. The possibility of a state law violation, however, had no bearing on the Court's conclusion: the Constitution applied to the contractor's actions. *Id.* at 57.

CAC's rule does not square with *West*. Under CAC's rule, if the medical contractor's treatment of the patient contravened state negligence or malpractice law, it could not be attributable to the State. But the Court decided *West* the other way. CAC's rule therefore cannot be the law.

More broadly, CAC's rule would allow prison medical contractors to disregard the Constitution because what was true in *West* will be true in virtually every case: if a prison doctor's treatment violates the Eighth Amendment, the same treatment will also violate state tort law. *See West*, 487 U.S. at 48 n.8. That is so *by this Court's design*—under the Court's precedent, the deliberate indifference test for constitutionally inadequate medical care requires a higher standard of fault than negligence or malpractice. *See Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976). "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.* at 106. The care must reflect "deliberate indifference," which is far more than a mere "inadvertent failure." *Id.* at 105–06. A deliberately indifferent defendant *knows of and disregards* a substantial risk of harm. *Farmer v. Brennan*, 511 U.S.

825, 837 (1994). Deliberate indifference requires negligence and then some. Therefore, under CAC's rule that the Constitution does not apply to a private party who violates state law, the Eighth Amendment would have nothing to say about deliberately indifferent medical care by prison contractors.

2. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), does not support CAC's approach. CAC reads *Lugar* in a manner that would undermine a core principle of *Monroe v. Pape*. *See* 365 U.S. 167, 183 (1961). "The federal remedy is supplementary to the state remedy . . . . Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." *Id.* When the Constitution is violated, "[i]t is no answer that the State has a law which if enforced would give relief." *Id.* Similarly, the existence of a state law violation is "no answer," *id.*, when a private party, delegated public functions and constitutional duties by the State, contravenes the Eighth Amendment.

CAC takes an overly restrictive view of the first prong of the analysis in *Lugar*. As CAC states, *Lugar* sets forth a two-part test. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State *or by a person for whom the State is responsible*." 457 U.S. at 937 (emphasis added). "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

The Court's full articulation of the first prong appears on page 937 of *Lugar*, but CAC quotes a truncated version from a subsequent page. *See* CAC Amicus Br. at 5 ("The first requirement is that 'the

claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority.'") (quoting *Lugar* 457 U.S. at 939). Critically, the truncated version omits that when the actor is "a person for whom the State is responsible," the first prong is satisfied. *Lugar*, 457 U.S. at 937.

That portion of the first prong did not matter much in *Lugar* because the actor was a private oil company seeking to attach a debtor's property. *See id.* at 924–25. There was no suggestion that the oil company, unlike a prison medical provider, had an ongoing connection to the State or performed a public function. *See id.* Indeed, it would have been obvious that an oil company employee would not qualify as "a person for whom the State is responsible." *Id.* at 937.

Lugar therefore focused on the *remainder* of the first prong—whether "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.* at 939. The Court concluded a private party's action does not "hav[e] its source in state authority" when the conduct violates state law. *Id.* But *Lugar* did not suggest that a violation of state law disposes of the first prong where the actor is "a person for whom the State is responsible." *Id.* at 937.

If the State delegates constitutional obligations to a contractor such as a private prison medical provider, the contractor, while performing those duties, becomes "a person for whom the State is responsible." *Id.* That core principal animates *West* and explains why "[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody." *West*, 487 U.S. at 56.

Thus, whether or not a private party's violation of state law can ever "hav[e] its source in state authority" under *Lugar*, this much is clear: *Lugar* does not address whether a state law breach disqualifies a private actor as "a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. *West*, however, answers that question plainly: when the State delegates correctional duties to a contractor, the contractor's actions are fairly attributable to the State, even when the contractor's actions contravene state law. *See West*, 487 U.S. at 48 n.8, 57.

C. Chicago Access Corporation's Proposal Would Cause Sweeping, Catastrophic Results.

1. Private providers are responsible for inmate medical care in most states, 20 of which contract out *the entirety* of health care in their prisons. THE PEW CHARITABLE TRUSTS, PRISON HEALTH CARE: COSTS AND QUALITY 11 (2017). Therefore, in large swaths of the nation, CAC's rule would eviscerate the long-standing Eighth Amendment floor for medical care in prison. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In state prison systems with private medical care, "deliberate indifference to serious medical needs of prisoners" would no longer "constitute[ ] the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Id.* (citation omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

A disaster would ensue. After all, private contractors have monetary incentives to provide constitutionally deficient care. As Judge Hamilton, joined by Judge Posner, wrote: "Private prisons and prison medical providers are subject to market pressures. Their employees have financial incentives to save money at the expense of inmates' well-being

and constitutional rights." *Shields v. Illinois Dep't of Corr.*, 746 F.3d 782, 794 (7th Cir. 2014). A prison contract nurse made the same point in starker terms: "We save money because we skip the ambulance and bring them right to the morgue."[2]

Wexford Health Sources ("Wexford") treats inmates in Illinois, Indiana, Alabama, Arizona, West Virginia, Pennsylvania, Florida, and Maryland. *Our Locations*, Wexford Health Sources, Inc.[3] All told, Wexford is responsible for providing healthcare to 97,000 prisoners in 270 prisons and jails. *History*, Wexford Health Sources, Inc.[4] Wexford's failure to provide constitutionally adequate health care is the subject of countless lawsuits. *See, e.g.*, Dan Christensen, *Florida prison healthcare providers sued hundreds of times*, Miami Herald (Oct. 2, 2013).[5]

One systemic illustration of Wexford's disregard for its patients appears in a 2014 neutral expert report prepared to "'assist the court in determining whether the Illinois Department of Corrections ("IDOC") is

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[2] Paul Von Zielbauer, *As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence*, N.Y. TIMES (Feb. 27, 2005), http://www.nytimes.com/2005/02/27/nyregion/as-health-care-in-jails-goes-private-10-days-can-be-a-death.html. *See also* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 484 (2005) ("Prison operators wishing to save money on medical care might, for example, create a deliberately unwieldy process for prisoners wishing medical attention, as has apparently been the strategy of Correctional Medical Services (CMS), a for-profit prison medical services company operating in prisons and jails in twenty-seven states.").

[3] https://jobs.wexfordhealth.com/locations/locations.

[4] http://www.wexfordhealth.com/About-Us/History.

[5] http://www.miamiherald.com/news/state/article1955813.html. Alan Mills, one of the attorneys for amici in this case, is also among the counsel for the plaintiff class in *Lippert*.

providing health care service to the offenders in its custody that meet the minimum constitutional standards of adequacy.'" Final Report of the Court Appointed Expert, Ron Shansky, MD et al., at 3, *Lippert v. Godinez*, No. 1:10-cv-04603 (N.D. Ill. Dec. 2014) [hereinafter "*Lippert* Report"].[6] That answer is no: the court-appointed experts reported that Wexford "has been unable to meet minimal constitutional standards with regards to the adequacy of its health care program for the population it serves." *Id.* at 45.

Across more than 400 pages, the neutral experts described the impact of Wexford's irresponsibility. Delay and neglect were endemic. *Id.* at 28–31. The experts reported "numerous examples" of patients presenting with life-threatening conditions who were not transported to a hospital, a failure that often resulted in catastrophic avoidable harm. *Id.* at 32. "[O]ne or more significant lapses in care" played a role in 60% of non-violent deaths, the experts reported. *Id.* at 42. "It was obvious that once patients signed DNR (do not resuscitate) orders, they were often no longer treated for even simple reversible illness," a chilling practice that compelled the experts to advise Wexford that "'do not resuscitate' does not mean, 'Do not treat.'" *Id.* at 43.

An Illinois River Correctional Center patient repeatedly complained of constipation and weight loss, but was not administered a rectal exam for nearly a year, by which point he had lost more than thirty pounds. *Id.* at. 29. Even then, the physician failed to notice a large, easily detectable tumor in the rectum. *Id.* Four more months elapsed before Wexford

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[6] https://www.clearinghouse.net/chDocs/public/PC-IL-0032-0007.pdf.

ordered a colonoscopy. *Id.* at 30. By then, it was too late—"he survived less than a year." *Id.*

A patient at Hill Correctional Center began complaining about chest and neck pain. *Id.* Three months later, he reported that he was coughing up blood and had lost thirty pounds. *Id.* A physician observed a tumor at that time, and ordered a chest x-ray, which noted abnormalities. *Id.* Nevertheless, several more months passed before Wexford ordered a CT scan, which "showed 'a very large carcinoma.'" *Id.* By that time, the patient weighed a mere 127 pounds, at least 30 pounds less than he had before. *Id.* He died several months later. *Id.*

Several years after successful pre-incarceration surgery to remove a brain tumor, a prisoner entered the Pontiac Correctional Center. *Id.* Within three months, physicians discontinued his maintenance chemotherapy. *Id.* Four months later, the patient was diagnosed with a "recurrence of a low grade" cancer. *Id.* Physicians waited more than two months to schedule surgery, by which time he had suffered a stroke and other neurological damage. *Id.* His cancer was no longer operable, and he died shortly after. *Id.*

A Menard Correctional Center patient suffering from cirrhosis presented with a severe gastrointestinal bleed. *Id.* at 32. Notwithstanding "evidence of substantial blood loss," physicians delayed admitting him to the hospital. *Id.* He died two days later. *Id.*

An Illinois River patient was admitted to the infirmary with "rapidly progressive paralysis of the lower half of his body." *Id.* When the patient could no longer "move his legs," he requested transfer to the hospital. *Id.* at 32–33. Physicians did not act on that

request for two weeks. *Id.* at 33. The patient now requires a wheelchair. *Id.*

A thirty-seven-year-old diabetic at Illinois River reported "symptoms highly suggestive of an acute stroke." *Id.* Physicians have consistently failed to send him to "an outside hospital for proper diagnosis or treatment." *Id.* He no longer has the "[]ability to function independently[.]" *Id.*

The quality of care Wexford provides in Illinois did not improve after the *Lippert* Report issued in 2014. A monitor appointed in connection with a class action alleging dangerously inadequate psychiatric care across all IDOC facilities released his first annual report in May 2017. *See* First Annual Report of Monitor Pablo Stewart, MD at 4, 7–8, *Rasho v. Walker*, No. 07-cv-1298 (C.D. Ill. May 22, 2017).[7] The monitor, a nationally recognized correctional healthcare expert, reported numerous systemic deficiencies, including those that expose patients to "great risk of harm." *Id.* at 31. When notified of these grave shortcomings, Wexford submitted a remedial plan that was "exceedingly insufficient." *Id.*

In Arizona, prisoners treated by Wexford charged that they were provided with abysmal healthcare throughout the Arizona Department of Corrections ("ADC"). *See Parsons v. Ryan*, 754 F.3d 657, 662 (9th Cir. 2014). Bolstering these allegations are ADC's own complaints about "serious and systemic deficiencies in Wexford's provision of health care to ADC inmates." *Id.* at 668. ADC has criticized Wexford for non-compliance with Department policies including: "[a] 'quantitative decrease in routine institutional care'";

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[7] https://www.clearinghouse.net/chDocs/public/PC-IL-0031-0026.pdf.

"'[i]nadequate staffing levels'"; and "'[i]ncorrect, incomplete, inconsistent medication administration or documentation of care provided[.]'" *Id.*

In a separate incident, a Wexford provider contaminated an Arizona prison's insulin supply, thereby exposing more than 100 inmates to hepatitis C. Caroline Isaacs, American Friends Service Committee—Arizona, *Death Yards: Continuing Problem's with Arizona's Correctional Health Care*, 9 (Oct. 2013) [hereinafter *Death Yards*].[8] Notwithstanding this widespread danger, Wexford did not alert government health officials for more than a week. *Id.* And at one Arizona prison, patients were forced to "lick powdered medication from their own hands after Wexford ran out of plastic cups and did not attempt to resupply them." *Id.*

An audit in Mississippi was "harshly critical" of Wexford for "failing to provide timely, adequate medical care." *See* Bob Ortega, *Critics cast doubt on new Arizona prison health-care contractor*, The Arizona Republic (Apr. 6, 2012).[9] A New Mexico audit reported "extensive medical-staff shortages." *Id.* Virginia officials also criticized Wexford for staff shortages. *Death Yards*, *supra*, at 9. And in Florida, Wexford was fined for delaying the provision of medical care. *Id.*

Corizon Health, the "foremost provider of correctional healthcare in the United States," operates in 22 states, serving 220,000 patients

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[8] https://www.afsc.org/sites/default/files/documents/DeathYardsFINAL.pdf.

[9] http://www.azcentral.com/arizonarepublic/news/articles/2012/04/05/20120405arizona-prison-health-contractor-critics-cast-doubt.html.

annually. *See About Corizon Health – Who We Are*, Corizon Health;[10] *About Corizon Health – Partner Locations*, Corizon Health.[11] Corizon currently has $2 billion in contracts in Missouri and Kansas alone. Andy Marso, *What is $2 billion buying Kansas and Missouri in prison health care? Few people know*, The Kansas City Star (Jan. 21, 2018).[12] Corizon, like Wexford, is beset with charges that it provides substandard care to its patients across the nation.

In Florida, for example, shortly after Corizon began providing care for the vast majority of the State's prisoners, "inmate deaths spiked to a 10-year high" and the "number of seriously ill prisoners sent for outside hospital care . . . drop[ped] by 47 percent." Pat Beall, *Privatizing Prison Health Care Leaves Inmates in Pain, Sometimes Dying*, Palm Beach Post (Sept. 27, 2014).[13] Florida Department of Corrections Secretary Michael Crews warned Corizon that "[t]he level of care continues to fall below the contractually required standard." *Id.*

Corizon did not diagnose a patient with cancer, even as lumps formed on her arm and back, and excruciating pain prevented her from dressing or bathing. David Reutter, *Florida Prisoner Deaths Spike with Privatized Prisoner Health Care*, Prison Legal News (Apr. 25, 2017).[14] In response to

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[10] http://www.corizonhealth.com/index.php/S=0/About-Corizon/Who-We-Are-History-and-Today.

[11] http://www.corizonhealth.com/About-Corizon/Locations.

[12] http://www.kansascity.com/news/politics-government/article195673934.html.

[13] https://www.mypalmbeachpost.com/news/privatizing-prison-health-care-leaves-inmates-pain-sometimes-dying/dL1RshgbLhhXvwnv1ov31H/.

[14] https://www.prisonlegalnews.org/news/2017/apr/25/florida-prisoner-deaths-spike-privatized-prisoner-health-care/.

complaints of pain so intense that the patient wanted to cut off her own arm, Corizon prescribed self-massage, rest, Tylenol, and warm compresses. *Id.* Corizon did not even bother to test for cancer until the prisoner was near death. *Id.* By that time, it was too late—she died days later. *Id.*

When another patient complained of excruciating pain from bone cancer, Corizon prescribed over-the-counter painkillers. Pat Beall, *Privatized care: Ibuprofen as bone cancer destroys inmate's spine*, The Palm Beach Post (Sept. 27, 2014).[15] When the pain did not abate, the patient was instructed to "come back after [you are] paralyzed . . . 'because there's nothing wrong with you.'" *Id.*

A prisoner without a hip joint was denied a hip replacement. Pat Beall, *No hip joint or painkiller, inmate lives in a wheelchair*, The Palm Beach Post (Sept. 27, 2014).[16] And then a Wexford doctor stopped his pain medication cold turkey. *Id.* The pain was so intense that the patient was forced to sleep in a wheelchair; he could not bear the pain of climbing into his bunk. *Id.* The prisoner confessed to "'wish[ing] God would take [him].'" *Id.*

The story is much the same in Idaho where Dr. Marc Stern, a nationally recognized correctional healthcare expert, "found serious problems with the delivery of medical and mental health care . . . resulting in serious harm" to prisoners. *See* Special Master Report at 3, *Balla v. Idaho State Bd. Of Corr.*,

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[15] https://www.mypalmbeachpost.com/news/privatized-care-ibuprofen-bone-cancer-destroys-inmate-spine/DGSMNTIfBD1QzQqhFB5jjN/.

[16] https://www.mypalmbeachpost.com/news/hip-joint-painkiller-inmate-lives-wheelchair/5NZdpy3X0BZQbIKMLHWNjJ/.

No. 1:81-cv-01165-BLW (D. Idaho Feb. 2, 2012).[17] Corizon's failures were "frequent, pervasive, [and] long standing." *Id.* They included delayed or "substandard" responses to medical crises. *Id.* at 14. In sum, Corizon's irresponsibility resulted in "dangerous" conditions that effectively "deprive[d] patients of their constitutional right to access to care[.]" *Id.* After being informed that it had failed 23 of 33 categories in a 2010 audit, Corizon failed an additional three categories in 2011. *Id.* at 3.

In California, Corizon was twice ordered by a court to provide proper treatment to a pretrial detainee suffering from a respiratory condition. Simone Aponte, *2 Investigates: Inmate's Death at Santa Rita Jail Raises Questions About Private Medical Company*, KTVU (last updated Dec. 9, 2016, 10:39 AM).[18] Notwithstanding a recommendation to treat the condition surgically, Corizon elected to prescribe nasal spray and Claritin. *Id.* The patient died of an acute respiratory attack. *Id.*

In Arizona, Corizon replaced Wexford after the latter was accused of providing deficient care. *See Death Yards*, *supra*, at 4. After reviewing Corizon's performance, the authors of a report on correctional healthcare in Arizona noted "if anything, things have gotten worse" since Corizon replaced Wexford. *Id.* The report faulted Corizon for "system-wide dysfunction," including "delays and denials of care, lack of timely emergency treatment, failure to provide medication and medical devices, low staffing levels, failure to provide care and protection from infectious disease,

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[17] http://www.idahoprisonhealthreport.com/assets/documents/SternReport.pdf.

[18] http://www.ktvu.com/news/2-investigates-inmates-death-at-santa-rita-jail-raises-questions-about-private-medical-company.

denial of specialty care and referrals, and insufficient mental health treatment." *Id.*

Many of the treatment examples above are unlawful under the Eighth Amendment's deliberate indifference standard and also constitute negligence and malpractice under state law. Under CAC's test, however, the violation of state law would eliminate the possibility of both injunctive and monetary relief to correct the appalling treatment described above. That abuse would occur in a constitutional vacuum.

2. In the interest of brevity, the discussion above has been limited to medical care, but the effects of CAC's rule would not be restricted to prison health contractors. Many American prisons are wholly privatized, meaning not only medical providers but also guards, counselors, and wardens work as contractors rather than as state employees. Fully privatized facilities house 8.5% of all federal and state prisoners in the United States. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 at 22 (2018). Such institutions also incarcerate nearly three quarters of immigration detainees, THE SENTENCING PROJECT, PRIVATE PRISONS IN THE UNITED STATES (2018), who have a Due Process right against barbaric conditions of confinement, *see Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982) (Due Process Clause governs conditions of confinement pursuant to civil process).

In private prisons, CAC's rule would exempt far more than medical care from constitutional protection. The Eighth Amendment would have nothing to say about a contract guard who broke state civil and criminal laws by beating a prisoner to death. And if State law prohibited contractors from raping

prisoners, the Eighth Amendment necessarily would not.

The Court should not adopt CAC's rule because it would allow private prison contractors to evade the Constitution. After all, "[t]he fact that a person may have a state-law cause of action against a public official who tortures him with a thumbscrew . . . has nothing to do with the fact that such official conduct is cruel and unusual punishment prohibited by the Eighth Amendment." *Ingraham v. Wright*, 430 U.S. 651, 690–91 (1977) (White, J., dissenting). Working as a prison contractor does not license the thumbscrew either.

CONCLUSION

The Court should reject CAC's proposed test for state action.

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No. 17-1702

IN THE
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORP., DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,
Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF NCTA – THE INTERNET & TELEVISION ASSOCIATION IN SUPPORT OF NEITHER PARTY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus Curiae* NCTA – The Internet & Television Association ("NCTA") states that it has no parent corporation and no publicly held company holds ten percent or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving nearly 80 percent of the nation's cable television customers, as well as more than 200 cable program networks. The cable industry is also a leading provider of residential broadband service to U.S. households.

The immediate question presented by this case is whether individuals who produce public access cable programming possess a First Amendment right to have that programming transmitted over public access cable channels. But behind this question is the more fundamental issue of whether the requirement imposed on NCTA's members to set aside public access channels in the first place violates *their* First Amendment rights by compelling them to retransmit content over which they lack all control and that they may not want to distribute. While the parties have not raised that issue here, the First Amendment interests of NCTA's members will be directly affected by the outcome in this case regardless of how this Court decides the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

questions presented. NCTA does not take a position on how the Court should decide those questions, but urges the Court to recognize in its opinion that the First Amendment rights of cable operators are burdened by the requirement that operators set aside public access channels, and to clarify that the Court is not deciding that this requirement is constitutional.

SUMMARY OF ARGUMENT

The case before this Court is framed as a dispute over the supposedly competing First Amendment rights of Petitioners, who manage public access cable channels on behalf of New York City, and Respondents, who produce original content that they wish to air on those channels. But this dispute cannot properly be analyzed without acknowledging the important, antecedent First Amendment rights of another entity: the cable operator that owns the network over which both Petitioners and Respondents claim they are entitled to exercise control.

Decades ago, Congress passed a statute that authorizes cable franchising authorities to require cable operators to cede capacity on their privately owned cable systems to franchising authorities for "public, educational, and governmental" ("PEG") channels, pursuant to terms and conditions established by the government. That statute also prohibits cable operators from exercising any editorial control over such channels. This Court has held that a cable operator's editorial discretion over the programming offered on its cable system is an exercise of speech protected by the First Amendment. Forcing cable

operators to relinquish control over PEG channels is a direct intrusion on those First Amendment rights.

This Court has never been directly presented with the question (and thus has never decided) whether the PEG-channel requirement violates the First Amendment rights of the cable operators that own that channel capacity, but there is good reason to find that it does. The PEG-channel requirement mandates that cable operators must retransmit speech with which they may vehemently disagree—indeed, even offensive speech. Moreover, the PEG-channel requirement is facially content-based. It is aimed at *particular* classes of speakers and requires cable operators to retransmit *particular* categories of speech based solely on its content. Finally, even assuming that there was a need to impose this burden decades ago when cable arguably exercised "bottleneck" control over programming delivered to viewers, there is no reason to continue to impose this burden today, when there are abundant alternative media to distribute the programming content that is transmitted over public access channels.

While the question of whether the PEG-channel requirement is itself constitutional is not directly before this Court, it is the backdrop against which this Court is deciding the actual questions presented here. Regardless of how the Court comes out on these questions, the First Amendment rights of cable operators will continue to be burdened. The Court should recognize that fact in its opinion and should make clear that in resolving this case, the Court is not implying or deciding that the PEG-channel requirement is itself constitutional.

ARGUMENT

I. Cable Operators Have First Amendment Rights That Are Burdened by the PEG-Channel Requirement.

Cable operators engage in protected speech under the First Amendment when they select the programming that they wish to transmit to their subscribers over the channels that they operate. This Court has never been squarely presented with the question of whether the PEG-channel requirement violates those protections, but there can be no question that it burdens cable operators' First Amendment interests. The PEG statute requires cable operators to transmit and associate with speech that they have not chosen to transmit and with which they may disagree, and that obligation is explicitly based on the content of the speech: cable operators must specifically associate with public, educational, or governmental programming.

As such, the PEG-channel requirement's burden on cable operators' First Amendment rights could only be justified by a compelling governmental interest to which the requirement was narrowly tailored. Even assuming that Congress enacted the PEG-channel requirement decades ago to further a then-legitimate governmental interest in ensuring cable subscribers' access to a wide variety of programming choices, the dramatic changes in the marketplace make it far more difficult today to justify the burden imposed by that requirement.

A. Cable Operators Have First Amendment Rights in the Selection and Transmission of Cable Programming.

This Court has repeatedly made clear that cable operators possess First Amendment rights with respect to the selection and transmission of programming over their networks. Cable operators engage in speech in at least two ways. First, they themselves produce original content that is transmitted over the cable systems that they own. Second, with respect to content produced by others, "cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include.'" *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979)). "Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats." *Id.* In these ways, cable television "partakes of" the "aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." *Id.*

Cable operators thus are entitled to the full First Amendment protections afforded to traditional members of the print media who both produce their own content and exercise editorial discretion. As this Court stated in *Leathers v. Medlock*, 499 U.S. 439 (1991): "Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of

its operation, part of the 'press.'" *Id.* at 444. Indeed, it is now so well-settled, that "[t]here can be no disagreement" that "cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-37 (1994); *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 815 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that the Court agreed in *Turner* that "cable operators are generally entitled to much the same First Amendment protection as the print media"); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1322 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (noting that cable operators "are similar to publishing houses, bookstores, playhouses, movie theaters, or newsstands in the sense that they exercise editorial control in picking the content they will provide to consumers").

B. When This Court Last Considered the PEG-Channel Requirement, It Did Not Decide the Provision's Constitutionality.

Against this backdrop of cable operators' First Amendment rights, this case comes to this Court framed as a dispute over the supposed First Amendment right of a producer of cable programming to transmit programming over the channels that have been commandeered by federal statute for the public's use. These channels are known as "public, educational, or governmental" channels, or "PEG" channels. 47 U.S.C. § 531(a), (b). Federal law requires a cable operator to obtain a franchise from a state or local

government (in this case, New York City) to construct and operate a cable system to provide cable television services, *see id.* § 541(b)(1), and authorizes this governmental "franchising authority" to require the cable operator to set aside PEG channels as a condition of granting or renewing the franchise, *see id.* § 531(a), (b). PEG channels can be managed by cable operators, but generally are managed by the local franchise authorities themselves or by nonprofit entities like Petitioner Manhattan Community Access Corporation. Regardless, and even if they manage the PEG channels themselves, cable operators are *prohibited* by statute from exercising "*any* editorial control over any public, educational, or governmental use of channel capacity." *Id.* § 531(e) (emphasis added).

This Court has never directly addressed whether this statutory requirement for PEG access is an unconstitutional infringement on cable operators' First Amendment rights. In *Denver Area*, a plurality of this Court agreed that Congress could not authorize cable operators to restrict obscene or unlawful content transmitted over PEG channels. *See* 518 U.S. 727. But as Justice Stevens noted, the PEG programmers' First Amendment claim in that case "depend[ed] for its success on the constitutionality of the underlying access rights" over the cable operator's network. *Id.* at 770 n.2 (Stevens, J., concurring). And, as the separate opinions in that case made clear, the Court did *not* address that antecedent question of whether "the Government has the authority to impose" the PEG "requirement[] on cable operators." *Id.*; *see id.* at 820-21 (Thomas, J., concurring in the judgment in part and

dissenting in part) ("[T]he constitutionality of . . . public access channels is not directly at issue in these cases."). Instead, in reaching the plurality decision in *Denver Area*, the Court simply "assume[d]" that the PEG requirement was constitutional. *Id.* at 770 n.2 (Stevens, J., concurring). Thus, in its only decision regarding the PEG-channel requirement, the Court bypassed the predicate question of whether that requirement violates the First Amendment rights of cable operators.

Justice Thomas, however, joined by Chief Justice Rehnquist and Justice Scalia, wrote separately to acknowledge the importance of that predicate question and to recognize the burden the PEG-channel requirement places on cable operators. As Justice Thomas explained, obligations that cable operators carry particular programming "interfere[] with the operators' editorial discretion by forcing them to carry broadcast programming that they might not otherwise carry." *Id.* at 816 (Thomas, J., concurring in the judgment in part and dissenting in part).[2] Indeed, "[t]here is no getting around the fact that . . . public access [is] a type of forced speech." *Id.* at 820.

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[2] The PEG-channel requirement also "burden[s] cable programmers by reducing the number of channels for which they can compete." *Turner*, 512 U.S. at 645.

C. The PEG-Channel Requirement Significantly Burdens the First Amendment Rights of Cable Operators.

The PEG-channel requirement is constitutionally suspect not only because it is forced speech, as Justice Thomas recognized in *Denver Area*, but also because it is facially both content-based and speaker-based and because it cannot be justified in light of today's market conditions.

The freedom to refrain from speaking is, of course, as protected as the freedom to speak. *Denver Area*, 518 U.S. at 821 (Thomas, J., concurring in the judgment in part and dissenting in part); *see also Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018) ("When speech is compelled ... individuals are coerced into betraying their convictions. . . . Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

When cable operators are forced to carry speech over which they cannot exercise any editorial control, there is a significant risk that cable subscribers—the customers on whom cable operators rely—will

incorrectly attribute the speech to the cable operators, assuming that the cable operators have *chosen* to transmit the programming that appears on those channels. This results in a significant harm to cable operators.[3] *See id.* at 15 (concluding that regulatory requirement that utility allow third parties to communicate messages in utility's billing envelopes "impermissibly requires [the utility] to associate with speech with which [it] may disagree," because the utility "may be forced either to appear to agree with [the third party's] views or to respond").[4]

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[3] For example, a cable operator was forced to carry programming from an organization classified as an active hate group by the Southern Poverty Law Center that encouraged violence, including gruesome beatings and beheadings. Another was forced to air a program in which a candidate for a local political office gossiped about opposing candidates' personal lives. Other examples abound. Cable operators often must respond to customer complaints regarding programming that is transmitted on PEG channels.

[4] In *Turner*, this Court rejected the argument "that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Turner*, 512 U.S. at 655. But that conclusion was based on the specific features of broadcast stations that render them recognizable to consumers as distinct from cable operators. *See id.* From a subscriber's perspective, there is a less clear demarcation between the programming that runs on PEG channels and the programming that runs on channels managed by the cable operator.

Moreover, the PEG requirement is particularly problematic because, as commentators have noted, it is "content-based on [its] face." Erik Forde Ugland, *Cable Television, New Technologies and the First Amendment After* Turner Broadcasting System, Inc. v. F.C.C., 60 Mo. L. Rev. 799, 837 (1995). Facially, the statute singles out "particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). The PEG-channel requirement compels cable operators to transmit certain types of content—programming dealing with public, governmental or educational issues. The statute thus speaks to the content of the speech transmitted, not merely the mechanism of transmission.

While forcing cable operators to speak is constitutionally suspect, doing so based on the content of the forced speech and the identity of the speaker is all the more so. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228. As a result, "[c]ontent-based laws ... are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. Similarly, laws such as the PEG-channel requirement "favoring some speakers over others demand strict scrutiny" specifically because "the legislature's speaker preference reflects a content preference." *Turner*, 512 U.S. at 658; *see also Reed*, 135 S. Ct. at 2230-31.

Even assuming there was a compelling governmental interest in providing a platform for public, educational, and governmental programming on cable systems when the PEG statute was originally enacted, there does not appear to be any such compelling interest today. This Court found in *Turner* that, in the 1980s and early 1990s when the PEG-channel requirement was imposed, "the physical connection between the television set and the cable network [gave] the cable operator bottleneck . . . control over most (if not all) of the television programming that is channeled into the subscriber's home." *Id.* at 656. As a result, "a cable operator [could] prevent its subscribers from obtaining access to programming it chooses to exclude." *Id.*

In light of cable's "bottleneck" control, "[t]he PEG . . . provisions were enacted to . . . afford[] speakers with lesser market appeal access to the nation's most pervasive video distribution technology," and to "[e]nabl[e] a broad range of speakers to reach a television audience that otherwise would never hear them." *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 6 (D.D.C. 1993), *aff'd in part sub nom. Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), and *aff'd in part, rev'd in part sub nom. Time Warner Entm't Co., L.P. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000).

That rationale—which the Court used in the 1990s to justify a similar intrusion on cable operators' First Amendment rights in the *Turner* cases upholding the "must-carry" provisions—no longer applies. As then-Judge Kavanaugh recognized several years ago in his

concurring opinion in *Agape Church, Inc. v. FCC*, 738 F.3d 397 (D.C. Cir. 2013): "In the two decades since Congress enacted the Cable Act of 1992, the video programming marketplace has radically transformed. Cable operators today face intense competition from a burgeoning number of satellite, fiber optic, and Internet television providers—none of whom are saddled with the same program carriage and non-discrimination burdens that cable operators bear . . . . Cable operators 'no longer have the bottleneck power over programming that concerned the Congress in 1992.'" *Id.* at 413-14 (Kavanaugh, J., concurring) (quoting *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009)). Indeed, of the seven multichannel video programming distributors ("MVPDs") that had over one million subscribers at the end of the third quarter of 2018, only four were cable companies—one was a telephone provider (Verizon Fios), another a satellite provider (DISH Network), and the third a combined telephone and satellite provider (AT&T).[5]

In today's dynamic marketplace, consumers can readily access video content not only from MVPDs but "through a variety of Internet applications, such as YouTube and Hulu," *Cablevision Sys. Corp.*, 597 F.3d at 1316 (Kavanaugh, J., dissenting), a list that only

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[5] Press Release, Leichtman Research Group, Inc., *Major Pay-TV Providers Lost About 975,000 Subscribers in 3Q 2018* (Nov. 13, 2018), https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-975000-subscribers-in-3q-2018/.

continues to expand, and includes Netflix, Amazon Prime Video, and other popular web-based video programming options.[6] Online video providers known as "virtual" MVPDs now compete with cable operators to provide full-fledged channel line-ups, including broadcast and cable channels as well as on-demand programming.[7] While, in the past, these online services were accessible only on computers, today's digital television sets include multiple connectors for peripheral devices that provide ready access to these services.[8] So-called "smart" TVs also come preloaded

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[6] *See also, e.g., In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 591 ¶ 55 (2017); YouTube by the numbers, https://www.youtube.com/yt/about/press/ (visited Dec. 7, 2018) ("Over 1.9 Billion logged-in users visit YouTube each month and every day people watch over a billion hours of video and generate billions of views.").

[7] *See, e.g.*, Jeff Baumgartner, *Virtual MVPDs Ended 2017 with 5.3 Subs: Study*, Multichannel News (Feb. 12, 2018), https://www.multichannel.com/news/virtual-mvpds-ended-2017-53m-subs-study-418107; Swaminathan Sankaranaryanan & Balasubramanian Muthuswamy, Infosys, *Virtual Multichannel Video Programming Distributor: The Game, Players and the Playing Field* (2017), https://www.infosys.com/industries/communication-services/white-papers/Documents/virtual-multichannel-video-programming.pdf.

[8] Jeff Baumgartner, *Study: 74% of U.S. TV Homes Have at Least One Connected TV Device*, Multichannel News (June 8, 2018), https://www.multichannel.com/blog/study-74-u-s-tv-homes-have-at-least-one-connected-tv-device.

with apps—and permit direct downloading of new apps—that easily connect to many of these services, rendering even a peripheral device unnecessary.[9] And all televisions today provide the capability to switch easily between and among online and MVPD services with a simple click on a remote control.[10]

Moreover, television is no longer the only means to obtain video programming. Wireless communications providers increasingly allow their customers to access video content online and on the go—completely bypassing both their local internet and cable providers. Smartphones and tablets empower the consumption of video whenever and wherever consumers want it.

This dynamic marketplace could not have been envisioned when the PEG-channel requirement was enacted and many of the aforementioned services did not even exist. Today, this intense competition among distributors of video programming for consumers means that a cable operator can no longer "prevent its

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[9] Jason Lynch, *Nearly 70 Million U.S. Households Now Have a Connected-TV Streaming Device*, AdWeek (Nov. 16, 2017), https://www.adweek.com/tv-video/nearly-70-million-u-s-households-now-have-a-connected-tv-streaming-device/.

[10] Thus, this Court's determination in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), that "it is rare for [cable subscribers] ever to switch" from cable to over-the-air broadcast television, *id.* at 220 (quoting S. Rep. No. 102–92, at 62 (1991)), even if accurate in 1997, no longer accurately describes cable subscribers' realistic alternative television programming options.

subscribers from obtaining access to programming [that the cable operator] chooses to exclude." *Turner*, 512 U.S. at 656. It also means that cable operators, alone among all of these providers of video programming services, are uniquely subject to onerous carriage obligations that place them at a competitive disadvantage based on outdated evaluations of the market in which they operate.

This increase in alternative distribution platforms is available not only to providers of commercial programming, but also to the producers of original programming of the type that previously might have had an outlet only on PEG channels. Today, Americans who want to distribute their own programming have instantaneous access to millions of "channels" and the ability to communicate with the world by uploading their own video content. Websites like YouTube allow users to upload, for free, original video content. That content can and often does reach far more viewers than a PEG channel. Individuals, educational institutions like public schools and universities, and governmental institutions can—and often do—use these web-based platforms for distributing video content to interested members of the public.[11] Many local governments now provide online access to both live streams and

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[11] Indeed, Respondents' programming is available on YouTube, acutely demonstrating cable operators' lack of bottleneck control over that speech. *See* DeeDee Halleck, *The 1% Visits El Barrio*, YouTube (July 29, 2012), https://www.youtube.com/watch?v =QEbMTGEQ1xc.

downloadable archived videos of local government meetings that previously were made available only on public access television. *See, e.g.*, New York City, New York, *City Council Videos*, https://councilnyc.viebit.com/ (last visited Dec. 10, 2018). As that example illustrates, local governments, educational institutions, and individuals can (and do) now easily provide content to interested citizens in ways that are far more user-friendly than a PEG channel. In short, any concern over cable's programming "bottleneck" in 1992 has been rendered obsolete by the introduction of satellite broadcasting and the advent of the internet.

This changed media landscape renders untenable the claim that the PEG-channel requirement is necessary to serve a governmental interest in providing access to speakers who would otherwise be unable to reach cable consumers. In today's media market, those speakers could reach that audience in numerous ways other than through a public access channel.[12]

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[12] In *Turner*, this Court held that intermediate, rather than strict, scrutiny applied in reviewing the "must-carry" statute that requires cable operators to set aside channels for broadcast stations like the local affiliates of NBC or CBS. *Turner*, 512 U.S. at 636-63. Importantly, however, that holding depended on the very technological features of cable television and the video programming market that, as explained in the main text, are no longer applicable today. *Turner*, 512 U.S. at 656. Today, for the reasons explained above, the appropriate standard of review for assessing the constitutionality of PEG channels would be the strict

II. Regardless of How It Resolves the Dispute in This Case, This Court Should Make Clear in Its Opinion That It Is Neither Holding Nor Implying That the PEG-Channel Requirement Is Constitutional.

As the foregoing makes clear, the dispute before this Court is somewhat artificial for the very reasons Justice Thomas recognized in *Denver Area*. *See* 518 U.S. at 820-22 (Thomas, J., concurring in the judgment in part and dissenting in part). Cable operators, not the parties before the Court, have the real First Amendment rights at stake. Here, just as in *Denver Area*, "it is the cable operator, not the access programmer, whose speech rights have been infringed." *Id.* at 824 (footnote omitted).

Respondents come to this Court essentially asserting a First Amendment right to have their programming distributed on PEG channels. But "the programmer's right to compete for channel space is derivative of, and subordinate to, the operator's

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scrutiny the Court applied in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Pacific Gas & Electric Co.*, 475 U.S. at 11 (plurality opinion). In any event, given the panoply of options for consumers and producers of video programming today, even under *Turner*'s intermediate scrutiny, it will be difficult for the government to explain how mandating carriage for PEG channels and speakers does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner*, 512 U.S. at 662 (quotation marks omitted).

editorial discretion." *Id.* at 816-17. Respondents, "[l]ike a freelance writer seeking a paper in which to publish newspaper editorials . . . [are] protected in searching for an outlet for cable programming, but ha[ve] no freestanding First Amendment right to have that programming transmitted." *Id.* at 817. Accordingly, "[i]t is not intuitively obvious that the First Amendment protects the interests [Respondents] assert." *Id.*

Petitioners, in contrast, come to this Court asserting that they are not state actors bound by the First Amendment and are simply private actors operating on a private cable system. But Petitioners miss the point. Any right they have to exercise (or not exercise) editorial discretion is statutorily created by the PEG-channel requirement and therefore comes at the expense of the editorial discretion of the cable operator. As Justice Thomas correctly observed in *Denver Area*, "the Court has not recognized, as entitled to full constitutional protection, statutorily created speech rights that directly conflict with the constitutionally protected private speech rights of another person or entity." *Id.* at 820.

In short, all parties before the Court "must concede that cable access is not a constitutionally required entitlement and that the right [Respondents] claim to . . . public access has, by definition, been governmentally created at the expense of cable operators' editorial discretion." *Id.* at 821-22. "Just because the Court has apparently accepted, for now, the proposition that the Constitution permits some degree of forced speech in the cable context does not

mean that the beneficiaries of a Government-imposed forced speech program enjoy additional First Amendment protections beyond those normally afforded to purely private speakers." *Id.* at 822. Here, just as in *Denver Area*, the question posed by the parties is whether there have been "improper restrictions on their free speech rights," but "the proper question is whether the [PEG requirement is an] improper restriction[] on the [cable] operators' free speech rights." *Id.*

Amicus takes no position on the actual questions presented by the parties. But it is important to recognize that, however this Court resolves those questions, it is likely to exacerbate the already substantial harm to cable operators' protected speech interests. If the Court rules for Petitioners, it will further cement Petitioners' control over channel capacity that rightly belongs to cable operators, but over which the operators are prohibited from exercising any editorial discretion. And if the Court rules for Respondents, it means that no one will have the right to exercise editorial discretion over the programming carried on PEG channels, increasing the risk that they will carry programming that is not only of little interest or value to a cable operator's customers, but also is offensive to those customers. Either way, cable operators are harmed further by the already burdensome PEG-channel requirement.

CONCLUSION

This Court should ensure that its decision makes clear that it is not implying or deciding that the PEG-channel requirement is constitutional and that its decision acknowledges cable operators' important First Amendment rights to exercise editorial control over the programming they transmit to subscribers.

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No. 17-1702

In The
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE NEW YORK COUNTY LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The New York County Lawyers Association ("NYCLA") is a not-for-profit membership organization committed to applying their knowledge and experience in the field of law to the promotion of the public good and ensuring access to justice for all. The Civil Rights and Liberties Committee of the New York County Lawyers Association produces comments and reports on local, state and national issues relating to constitutional rights. Both the NYCLA and its Civil Rights and Liberties Committee have a particular interest in government actions and the constitutional rights of individuals in the borough of Manhattan—as Manhattan is simply the municipal corporation geographically bound by, and coterminous with, New York County.

Founded in 1908, the New York County Lawyers Association has historically been one of the largest and most influential county bar associations in the country. At the time of its founding, the only existing bar association in Manhattan precluded some lawyers from membership by virtue of their ethnicity, religion, gender and/or race.

In 1907, a group of lawyers gathered in Carnegie Hall to address the prospect of forming a bar group where heritage and politics were not obstacles to

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, counsel for all parties received timely notice of *amicus*'s intent to file this brief and consented in writing. No counsel for any party authored this brief in any part; no person or entity other than *amicus* or its counsel made a monetary contribution to fund its preparation or submission.

inclusion. The bar leaders who met were determined to create, in the words of Hon. Joseph H. Choate, who would become president in 1912, "the great democratic bar association of the City [where] any attorney who had met the rigid standards set up by law for admission to the bar should, by virtue of that circumstance, be eligible for admission."

Throughout its history, NYCLA's bedrock principles have been the inclusion of all lawyers who wish to join, public education, and the active pursuit of legal system and public policy reforms at the local, state and national levels. NYCLA's groundbreaking 1952 report on public apathy toward delinquent children brought wide acclaim and won the endorsement of Mayor Robert F. Wagner. In 1943, the Association refused to renew its affiliation with the American Bar Association for its refusal to admit black lawyers. In 1949, NYCLA sponsored a conference on civil rights in the post-World-War-II era. In addition, NYCLA's Women's Rights Committee challenged and helped change provisions of the Internal Revenue Code that had a discriminatory impact on women and married couples.

For these reasons, NYCLA has a direct and vital interest in the issues before this Court. This brief has been approved by the NYCLA Executive Committee.

SUMMARY OF ARGUMENT

New York is well-known as a city of loud-mouths. New Yorkers have opinions on every issue, and when

they voice those opinions, they don't mince words. In professional baseball stadiums, for example, New Yorkers boo their favorite players when they strike out, a form of expression that does not commonly occur in other cities in the United States. Mike Bates, *A Brief History of Booing in the Bronx*, THE HARDBALL TIMES (Apr. 30, 2018), https://www.fangraphs.com/tht/a-brief-history-of-booing-in-the-bronx/.

The esteem in which New Yorkers hold their right to voice their opinions is deeply engrained in New York's history and tradition. For example, even in colonial times, journalist and printer John Peter Zenger so often published uncomplimentary statements about the colonial governor that the governor imprisoned Zenger and sued him for libel. "The results of the trial had imbued the people with a new spirit; henceforth they were united in the struggle against governmental oppression, and as Gouverneur Morris has well said: 'The trial of Zenger in 1735 was the germ of American freedom, the Morningstar of that liberty which subsequently revolutionized America.'" Livingston Rutherford, JOHN PETER ZENGER HIS PRESS, HIS TRIAL, AND THE BIBLIOGRAPHY OF ZENGER IMPRINTS 131 (New York Dodd, Mead & Company 1905).

Exercising their right to free expression, New Yorkers have consistently tested and expanded the boundaries of that right. For example, in 1960, the New York Times took a chance when it published statements about civil rights issues in the South, which Montgomery, Alabama, Public Safety Commissioner L.B. Sullivan considered personally defamatory. His

libel lawsuit ended in a landmark decision from this Court upholding and expanding freedom of the press. *New York Times v. Sullivan*, 376 U.S. 254 (1964). A few years later, in 1971, the New York Times again tested the limits of free expression by printing the Pentagon Papers. Again, this Court ruled in favor of free expression. *New York Times Company v. United States*, 403 U.S. 713 (1971). This passion for the right and opportunity to speak one's mind underlies the instant case.

This passion led to the creation of public access channels that gave New Yorkers an uncensored forum to express themselves on matters of public concern, free of charge, and on a first-come, first-served basis. Laura Landro, *Public-Access TV In New York Tends Toward Sex, Sadism*, WALL ST. J., Dec. 20, 1982, at D1, 14. In 1970, the City of New York granted 20-year cable television franchises to two companies, which five years earlier, had begun laying cable wires under the streets of Manhattan. In exchange for granting them 20-year monopoly franchises and public easements to lay cable wires on public property in Manhattan, the City required that each company administer two channels for New York City's commercial-free self-expression. *Id.* The public access channels, while administered by the cable companies, were "owned" by the City—similar to the manner in which the City, when it sells land to real estate developers, retains ownership of a plot of land and requires the developer to build and maintain a public park or playground on that plot.

That same passion for free expression is why, in 1990, when the City negotiated the renewal of the Manhattan cable television franchise agreements, it included several provisions that strengthened the First Amendment rights of New Yorkers to freely express themselves on public access channels—most importantly by requiring that the public access channels be administered by a nonprofit community access organization chosen by the Manhattan Borough President, rather than by the cable companies themselves.

In 1991, Manhattan Borough President Ruth Messinger chose the Petitioner, Manhattan Community Access Organization, which does business as the Manhattan Neighborhood Network ("MNN"), to administer Manhattan's public access channels. As explained in public statements by Borough President Messinger and MNN's board chairperson, Gretchen Dykstra, the City considered public access channels to be public forums. Their statements demonstrated that the City believed a nonprofit community access organization would do a better job of administering the public access channels for the benefit of the public than the cable companies themselves. Importantly, MNN's mission was, and still is,

> to ensure the ability of Manhattan residents to exercise their First Amendment rights through moving image media to create opportunities for communication, education, artistic expression and other non-commercial uses of video facilities on an open and equitable basis.

> In providing services, we seek to involve the diverse racial, ethnic and geographic communities of Manhattan in the electronic communication of their varied interest, needs, concerns and identities.

MNN, ANN. REP. 2016, https://www.mnn.org/sites/default/files/mnn_ar_122917.pdf.

In sum, the City clearly intended to create a public forum when it created the nation's first public access channels in the 1970 Manhattan cable franchise agreements. The public access channels themselves constitute a form of property, of which the City retained ownership, in exchange for allowing the cable companies to lay their cable wires on public land. Unfortunately, because the public access channels were administered by the private cable companies, they were underfunded, underpublicized, and thus, underused by many of Manhattan's diverse communities. That is why, when the City negotiated the renewal of Manhattan's cable franchise agreements in 1990, it required that the public access channels be administered by a nonprofit community access organization ("CAO"), and further required that the newly formed Time Warner, Inc.—the parent company of both of Manhattan's cable operators—provide $5.35 million in startup funding for the Manhattan CAO to create additional public access channels. It also required that Time Warner agree to other terms that would ensure the CAO was properly funded, publicized and utilized by all of Manhattan's diverse community groups. Moreover, the City chose MNN to administer the public

access channels and mandated that MNN expand use of the public access channels by all of Manhattan's diverse communities, to ensure public access to a diversity of opinions—especially opinions not aired in mainstream media—on matters of public concern.

That decision—to create a public forum—should be respected. Especially where, as here, the public forum was created by the City with the explicit intent of increasing the diversity of voices and viewpoints on matters of public concern. As this Court has repeatedly reaffirmed, speech on matters of public concern "occupies the highest rung on the hierarchy of First Amendment values, and is entitled to speech protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983).

Petitioners argue that when the state delegates responsibility to an organization to administer the operation of its property, the organization's operation of the property does not constitute state action. But this is not that case. Here, the City of New York expressly created a public forum in 1970 when it launched the nation's first experiment with public access television, and in 1990, after the private cable companies had failed to adequately administer the public access channels for nearly twenty years, required as a condition of renewing the cable franchise agreements that the public forum be administered by an independent nonprofit community access organization—MNN. If the Court accepts Petitioners' argument, the only First Amendment-protected public forums would be the ones under strict state control. That should not be the only option. Allowing municipalities to partner with private

entities to create and administer public forums will lead to more free speech.

For these reasons, and the reasons detailed more fully herein, the decision below correctly found that Respondents' amended complaint pled sufficient facts to plausibly allege Manhattan's unique public access channels are designated public forums, and that Petitioners, as operators of the subject public access channels, are state actors under the facts of this case.

ARGUMENT

I. This Court should respect New York City's historic decision to create the country's first public access channels and designate them as public forums.

Public access television is the result of an experiment by the City of New York, which created the world's first public access channels in 1970. That year, the City awarded 20-year monopoly cable franchises to Teleprompter Corporation (later renamed Manhattan Cable TV), and Sterling Manhattan Cable (later renamed Paragon Cable). The original franchise agreements, signed in the summer of 1970, required both Sterling and Teleprompter to provide two public channels each by July 1, 1971. The agreements further required that additional public channels be made available as channel capacity expanded. Richard Calhoun, CTR. FOR PUB. POLICY RESEARCH, PUBLIC TELEVISION CHANNELS IN NEW YORK CITY: THE FIRST

SIX MONTHS 3 (1972), https://files.eric.ed.gov/fulltext/ED066897.pdf.

Sterling and Teleprompter needed easements to lay their cable wires on public property; in exchange, the City required that each company make two public access channels available to New Yorkers on a first-come, first-served basis, and that they provide adequate studio facilities and technological assistance to noncommercial individuals and groups. *Id.* at 1. The franchise agreements also prohibited the companies from controlling program content "except as is required to protect the Company from liability under applicable law." *Id.* at 27-28. The City's goal was that, by opening programming time for community dialogue, the public access channels would increase the diversity of opinions on matters of public concern.

The purpose of the public access channels was to afford New York's diverse communities a chance to discuss, "some of the problems that are unique . . . that are of interest" to them and to "encourage young people who were very militant in some areas who said that they . . . were denied access to some of the public media, to give them an opportunity to say what they wanted to say." *Id.* at 34.

The New York Times hailed the public access channels as, "the first genuine 'Town Meeting of the Air' and a major step toward the political philosopher's dream of participatory democracy," and recognized that the City and cable companies expected, "if successful, [would] set the pattern for the rest of the

country." George Gent, *City Starting Test of Public Cable TV*, N.Y. TIMES, July 1, 1971, at 95.

A. 1965–1970: Manhattan's initial cable experiment.

The 1970 franchise agreements and creation of the four public access channels was a result of Manhattan's initial five-year experiment with cable television, which had begun on December 2, 1965, when New York City awarded the world's first major urban cable television franchises to Sterling and Teleprompter in Manhattan, and to CATV Enterprises in the Riverdale neighborhood of the Bronx. Clayton Knowles, *3 Given Franchises To Provide Cables For Better City TV*, N.Y. TIMES, Dec. 3, 1965, at 1, 78. Known as Community Antenna Television ("CATV"), the new service promised to ameliorate the reception problem experienced by 40 to 50 percent of Manhattan's approximately 554,900 television homes, caused by Manhattan's tall buildings, which interfered with television signals broadcast over the airwaves. Jack Gould, *Community-Antenna TV: Picture of Vast Potential*, N.Y. TIMES, Dec. 6, 1965, at 75.

CATV solved the interference problem by erecting a separate antenna where there was no interference. The antenna received broadcast signals and relayed those signals to subscribers via coaxial cables. Under the 1965 agreements, the companies obtained the right to run their cables beneath the City's streets, while the City maintained control of the rates and performance

standards. The Sterling franchise extended south from 86th Street on the East Side and 79th Street on the West Side of Manhattan Island, while the Teleprompter franchise extended north, covering the rest of the island. *Id.*

The 1965 franchise agreements required the companies to carry the City's 12 broadcast channels and prohibited "pay TV" and programming originated in other communities. Clayton Knowles, *3 Given Franchises To Provide Cables For Better City TV*, Dec. 3, 1965, N.Y. TIMES, p. 1, 78. The term of the "experimental" franchise agreements was just two years. Additionally, if the companies' profits exceeded seven percent, the City had the option of reducing installation and service charges. *Id.* Moreover, while the companies were limited to airing the City's 12 channels, the cables had the capacity to carry more than 30 channels. Leah Churner, *Out of the Vast Wasteland*, MOVING IMAGE SOURCE (June 18, 2009), http://www.movingimagesource.us/articles/out-of-the-vast-wasteland-20090618.

The potential public benefits of cable television were immediately obvious, so much so that, in June 1967, Mayor John Lindsay appointed a task force, chaired by Fred W. Friendly, the former president of CBS News and then-current Columbia University professor of journalism, to consider "how modern telecommunications technology can be best exploited to further the economic life and social well-being of the City, and how the benefits of this technology can best be preserved for all who live and work in the City."

Calhoun, *supra*, at 33. On September 18, 1968, the task force issued its report, finding that "[w]hat is at stake here is more than a method for the reception of television programs. We are ultimately concerned with methods of communication that can materially help educate our children and meet the special needs of those in the city who are economically and culturally deprived." Robert E. Dallos, *Advisers Propose More CATV in City*, N.Y. TIMES, Sept. 19, 1968, at 94. The task force concluded that cable franchise agreements should require the cable operators to reinvest some portion of their profits into "quality programming" that is in the "public interest." Calhoun, *supra*, at 13.

The cable companies publicly agreed that the new technology should be used, in part, to serve the interests of Manhattan's diverse communities. Manhattan Cable was "particularly pleased" that the Task Force report "supports what we have been advocating . . . for some time. That is that the full capabilities of the cable we're installing should be used in every way to benefit the community.'" Dallos, *supra*, at 94. Likewise, Teleprompter executive Irving Kahn agreed that cable companies had a duty to facilitate social change and must "face up to the realities of ghetto programming—and the whole spectrum of community relations, employee relations, hiring practices and other issues that go hand in hand with establishing and keeping an effective role in the community." Calhoun, *supra*, at 31.

B. When New York City created the first public access channels in 1970 it designated them as a public forum.

When the City expanded its cable television experiment in 1970, the proposed contracts with the cable companies reflected the City's vision of public access for all New Yorkers. The new franchise agreements called for a channel capacity of 17 by July 1, 1971, and 24 within three years. Of the original seventeen channels, 11 would be for regular UHF and VHF broadcasting, two would be "public channels" and one would be for a "company channel" on which the companies could air their own original programming. Thereafter, additional channels would be allotted in a sequence of one city channel, two public channels, and three "additional channels" that the company could use for anything but "pay television." Calhoun, *supra*, at 27.

The franchise agreements required that access to the public channels be made available on a "first-come, first-served basis," and that the companies provide "adequate studio facilities" and "appropriate technical assistance" to "members of the public." Moreover, the companies were prohibited from controlling program content "except as is required to protect the Company from liability under applicable law" or programming that was essentially for a commercial purpose. Calhoun, *supra*, at 27–28.

The proposed franchise agreements also required the wiring of all prisons, hospitals, police and fire stations, day care centers and public schools free of

charge for the receipt of all "basic" FCC required services. Additionally, they required the companies to provide "the best possible signal available under the circumstances and quality reception of its Basic Service to each subscriber so that both sound and picture are produced free from visible and audible distortion." *Id.* The terms of the agreements were to be 20-years, and called for review of basic services by the City after five years, and rate review after eight years. Calhoun, *supra*, at 28.

Recognizing that support of the public access channels would be key to securing City approval of their proposed 20-year monopoly cable franchise agreements, executives from both Sterling and Teleprompter publicly expressed strong support for the City's vision of the public access channels. Charles F. Dolan, then President of Sterling, the holder of the southern Manhattan franchise, stated that the proposed new contract was "a bold effort to open the doors wide to community participation in cable television. Under this contract no one is excluded." Calhoun, *supra*, at 28. Similarly, Teleprompter executive Irving Kahn rebuffed critics of the proposed contracts, stating, "[a]ny contention that we have not, may not or will not operate in the public interest is false. Our record to date is one of public service. Our promise to you safeguarded by the language of a very tough, expertly drawn contract is that we will always operate in the public interest." Freddie Ferretti, *City Delays Its Decision on CATV Policy*, N.Y. TIMES, July 24, 1970, at 63.

The City ratified the proposed franchise agreements, thereby creating the world's first public access television channels.

C. The cable companies' operation of Manhattan's public access channels under the 1970 franchise agreements was inadequate.

The agreements themselves left unanswered questions regarding public access administration, funding, and the level of editorial control that the companies could assert. Accordingly, in 1971, the City drafted interim rules for Manhattan's public access channels, "to establish that anybody and everybody who wanted an opportunity to be heard could get on and be heard." Calhoun, *supra*, at 43. The only restrictions were on obscene material and programming by unaccompanied minors (under the age of 18). *Id.* at 44.

The companies requested that applications for time allotments be submitted two weeks in advance, but that time could generally be shortened if needed. *Id.* The information required to be submitted included the program's length, subject, list of individuals appearing in it, whether it was live or taped, the sponsoring organization or individual, and whether studio facilities would be required. *Id.*

Public Access Channel C was for series programming, and Public Access Channel D was for non-series programming. The City's Interim Rules required that

space on Channel C be awarded on a first-come, first-served basis with no more than two hours of prime time (7:00-11:00 p.m.) being assigned to any one user. *Id.* Users were also limited to seven hours of total program time per week, unless there were open time slots. *Id.* Channel D was for non-series, or occasional, instead of regular, programming. Programmers were limited to no more than one exposure in a specific time slot per month and would be bumped if their total programming for the month was greater than five hours between both channels. *Id.*

During the early years, the biggest challenge for public access programming was informing communities that the channels were available for their use, free of charge. George Gent, *Public Access TV Here Undergoing Growing Pains*, N.Y. TIMES, Oct. 26, 1971, at 83. Besides publicity, the other problem was money. The main video production centers were run by nonprofit organizations and funded with seed money from private foundations. *Id.*

As predicted, the Manhattan cable franchise agreements became a model for franchising authorities nationwide. Throughout the 1970s and 1980s, most franchising authorities required cable companies to create and administer public access channels as a condition of running cable wires on public property. By 1989, public access was "a vital part of almost 2,000 CATV systems across the United States." Douglas Davis, *Public-Access TV Is Heard in the Land*, N.Y. TIMES, June 11, 1989, at 231.

Just like Sterling and Teleprompter, these other companies knew that public access was a "major consideration in awarding cable franchises." Laura Landro, *Public-Access TV In New York Tends Toward Sex, Sadism*, WALL ST. J., Dec. 20, 1982, at 1, 14. Unlike New York, however, other franchising authorities awarded cable franchises pursuant to open bidding processes, which led cable companies "to try to outdo each other with multimillion-dollar grants for public programming, lots of studios, large production staffs and crews, and state of the art equipment." *Id.* Because of the large amount of money they received, public access boomed "in virtually every large community beyond Manhattan." Douglas Davis, *Public-Access TV Is Heard in the Land*, N.Y. TIMES, June 11, 1989, at 231.

On the other hand, the Manhattan cable franchise agreements, and New York City and State regulations, provided stronger First Amendment protections for its public access channels. This led Manhattan's "underfinanced channels C and D [to] offer . . . programming that [was] thoroughly unique" and "stretch[ed] our rigid notion of what television [could] be, or do." *Id.* Manhattan's public access channels remained "citadels of electronic democracy," that offered "on shoestring budgets" a variety of programs such as "high-minded seminars on topics ranging from urban decay to sexist mythology, video-art experiments featuring frisky computerized graphics and earnest documentary studies of often neglected subjects—like the plight of the disenfranchised or the perils of hibiscus mold." *Id.*

Ironically, while Manhattan public access television was still truly avant-garde, on February 2, 1989, in NBC's Manhattan studios, Saturday Night Live aired a sketch called *Wayne's World*, centered on a fictional local public access television program in Aurora, Illinois, hosted by Wayne Campbell (Mike Myers), an enthusiastic and sardonic long-haired metalhead, and his timid and sometimes high-strung, yet equally metal-loving sidekick and best friend, Garth Algar (Dana Carvey). Noel Murray, *10 Things You Didn't Know About Wayne's World*, ROLLING STONE, Feb. 14, 2017, https://www.rollingstone.com/movies/movie-news/10-things-you-didnt-know-about-waynes-world-115363/. *Wayne's World* quickly became one of the show's most popular recurring sketches—appearing a total of 19 times. *Id.* In 1992, Mike Myers and Dana Carvey's Wayne's World movie, based on the sketches, became the 8th highest grossing movie of the year. *Id.* Since its release, the movie has grossed a total of approximately $180 million. *Wayne's World*, BOX OFFICE MOJO, https://www.boxofficemojo.com/movies/?id=waynesworld.htm (last visited Jan. 15, 2019).

D. The City extracted concessions from Time Inc. and Warner Communications Inc. to improve public access programming during their merger negotiations.

It was in this backdrop that on March 4, 1989, Time Inc. and Warner Communications Inc. announced their plan to merge into Time Warner, Inc. and become the largest media company in the world. The merger

negotiations took place approximately one year prior to expiration of the Manhattan cable franchise agreements held by Manhattan Cable Television (formerly Sterling) and Paragon Cable Manhattan (formerly Teleprompter), both of which were owned by subsidiaries of Time Inc.

When Time and Warner Communications announced their planned merger on March 4, 1989, both companies had to obtain approval from the City to transfer the six cable franchises that they owned or controlled into the merged corporation, including Manhattan Cable TV and Paragon Manhattan Cable. David W. Dunlap, *Panel Questions Time-Warner Plan*, N.Y. TIMES, May 28, 1989, at 33. Time Inc. owned the two Manhattan franchises, and Warner Communications owned four franchises in Queens and Brooklyn. *Id.* Combined, the companies controlled cable television in 60 percent of New York City's households. *Id.* The transfer negotiations were hampered by, *inter alia*, the cable operators' failure to comply with all of the requirements of the 1970 franchise agreements. Under the terms of the 1970 franchise agreements, Time Inc. was supposed to have completed laying cable wire to all of Manhattan's residential buildings by 1974. As of March 1989, however, an estimated 200,000 residents lived on blocks that had not yet been wired. David W. Dunlap, *Pact May Improve Cable TV Service*, N.Y. TIMES, June 16, 1989, at B3. The unwired blocks were located primarily in Harlem and the Lower East Side, Manhattan's poorest and most racially segregated neighborhoods. *Id.*

City officials were particularly concerned that Harlem and the Lower East Side were disproportionately underserved by the cable operators. *Id.* They were also concerned that with one company controlling the majority of New York City's cable programming, program diversity would decrease. David W. Dunlap, *Panel Questions Time-Warner Plan*, N.Y. TIMES, May 28, 1989, at 33.

Gerald M. Levin, vice chairman of Time Inc., who would become vice chairman of Time Warner, answered that Time Warner was "absolutely committed" to diversity, which he said was more a product of the number of channels than the number of operators. *Id.* After several months of negotiations, the City approved the franchise transfers on June 15, 1989. David W. Dunlap, *Pact May Improve Cable TV Service*, N.Y. TIMES, June 16, 1989, at B3. As a condition of the approval, however, Time Inc. agreed to complete the wiring of all residential blocks in Manhattan by July 1990—and thereby increase public access viewership—before the expiration of the original franchise agreement. John L. Hanks, director of the city's Bureau of Franchises, stated that Time "stood no chance whatever, as things stood a few months ago," of getting a renewal. *Id.* The agreement to transfer the franchises did not affect the 1990 expiration dates of the underlying franchise agreements.

E. The City used the renewal provisions of the Cable Communications Policy Act of 1984 to force Time Warner to make significant investments to improve public access programming in Manhattan.

Renewal negotiations were likewise hampered by the cable companies' failures with respect to public access. "From the city's point of view, the transmission of noncommercial programs by the public, government and nonprofit institutions is the most important issue in cable's future." Editorial, *Topics of The Times; The Midnight TV Drama*, N.Y. TIMES, May 19, 1990, at 22. Because Manhattan Cable and Paragon had failed to adequately fund, promote or encourage their use, "[n]estled in the heart of the country's most sophisticated audience, access television languishe[d], like a child starving amid plenty." Douglas Davis, *Public-Access TV Is Heard in the Land*, N.Y. TIMES, June 11, 1989, at 31.

The renewal negotiations were governed by the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (the "Cable Act"), which provided procedural and substantive rules for renewing cable franchise agreements. 47 U.S.C. § 546(a)–(g). But for Cable Act rules establishing the reasons a franchise authority may refuse to renew a cable franchise, and the standards and procedures the Act established, the City likely would have lacked the bargaining power to obtain strong protections for public access channels, including the administration of those channels by an

independent not-for-profit community access organization.

The Cable Act was intended, *inter alia*, to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems" through procedures and standards that "encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. §§ 521(3), 521(2).

The Cable Act reflects Congress' intent that "a cable operator whose past performance and proposal for future performance meet the standards established by this section [will] be granted renewal," H.R. Rep. No. 98-934, at 7 (1984), 1984 U.S.C.C.A.N. 4667. Thus, the Cable Act recognizes that a cable franchise operator has "a significant federal property expectation" in the renewal of its franchise. *Eastern Telecom Corp. v. Borough of East Conemaugh*, 872 F.2d 30, 35 (3d Cir. 1989). Nonetheless, the Act does not guarantee the operator renewal.

The Cable Act establishes formal franchise renewal procedures at 47 U.S.C. §§ 546(a)–(g). The formal renewal process can be initiated by either the franchising authority (on its own initiative) or the cable operator (by submitting a written renewal notice to the city) during the six-month period beginning three years before franchise expiration. If the operator does not submit a request to the city during this six-month window, the city is under no legal obligation to follow

formal Cable Act procedures—unless the city has commenced a formal proceeding on its own initiative.

At the same time, the Cable Act permits a franchisee to pursue informal negotiations with the franchising authority. Thus, the statute explicitly encourages state and local cable franchisors and operators to pursue a "two-track" process, whereby a franchising authority simultaneously pursues both the formal and informal renewal processes. State and local franchisors must establish procedures which allow them to proceed on both tracks.

A franchising authority may deny renewal if, after the required administrative proceedings, the authority finds any of the following:

- the cable operator has failed to substantially comply with the material terms of the existing franchise and with applicable law;
- the quality of the operator's service has been unreasonable in light of community needs;
- the operator lacks the requisite financial, legal or technical ability; or
- the operator's proposal is inadequate to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

47 U.S.C. § 546(c)(1).

A renewal request may be denied based on any one of the four statutory factors. 47 U.S.C. § 546(d)(1). However, a decision not to renew cannot be based on

past defects in performance if (a) the operator was not given notice and an opportunity to cure the defects, or (b) if the city has waived its right to object or has acquiesced in past failures to perform by failing to object after receiving written notice from the operator of a "failure or inability to cure." *Id.*

Because of the Manhattan cable operator's failure to comply with the requirements of the 1970 franchise agreements, and their weak proposals for public access going forward, on May 16, 1990, the City preliminarily denied renewal of the two cable television franchises. Todd S. Purdum, *Time Warner Loses a Vote on Cable TV*, N.Y. TIMES, May 16, 1990, at 29–30. Manhattan Borough President Ruth Messinger negotiated with Time Warner until minutes before the renewal vote, pressing company executives for more public access funding and better production facilities for public access producers. *Id.*

The denial triggered an administrative hearing under the Cable Act's formal renewal provisions. *Id.* At the same time, Time Warner and the City continued to negotiate informally.

Several weeks later, negotiators reached agreement on several points. The main area of disagreement concerned the amount of capital and operational support that Time Warner would contribute for public access channels. Leonard Buder, *Time Warner Is Closer to a Cable Franchise Pact*, N.Y. TIMES, June 3, 1990, at 40.

After several more weeks of negotiations, Time Warner ultimately agreed to several provisions demanded by the City to ensure the public access channels were properly funded and administered, and the City renewed the franchise agreements on June 27, 1990. James Barron, *Cable TV Rates Likely to Rise in Manhattan With New Pact*, N.Y. TIMES, June 28, 1990, at 1, 30.

F. The 1990 Manhattan cable franchise agreements strengthened the First Amendment rights of Manhattan's residents to freely express themselves on the public access channels.

When the City negotiated renewal of the franchise agreements in 1990, it used the Cable Act and other legal developments to require Time Warner to improve and strengthen public access television in Manhattan. It did so by requiring, *inter alia*, that, instead of being administered by the companies themselves, the public access channels be administered by a nonprofit community access organization chosen by the Manhattan Borough President; Time Warner provide $5.35 million in startup capital funding to the community access organization; and Time Warner fund a community access grant program by paying the community access organization a fee of $3 per cable subscriber per year.

Thereafter, acting on behalf of the City of New York, Manhattan Borough President Ruth Messinger chose the Petitioner, Manhattan Community Access

Organization, which does business as the Manhattan Neighborhood Network ("MNN"), to administer Manhattan's public access channels. MNN's mission is to train "community-based organizations to produce public access shows telling their individual stories" and to ensure the ability of Manhattan's residents to exercise their First Amendment rights. Gretchen Dykstra, *Public Access TV Gets Communities Involved*, N.Y. TIMES, May 31, 1993, at 22.

MNN's bylaws and franchise agreement with the City protect quintessential New York free speech rights—MNN must air residents' programs on a first-come, first-served basis, and MNN and the City are prohibited from exercising editorial control or otherwise regulating public access programs based upon content.

Borough President Messinger reaffirmed the City's intent to create a public forum in a press release on May 16, 1991, the day MNN's initial board of directors ratified its bylaws. Messinger stressed that the bylaws contained several provisions that she had insisted be included, including that MNN have "an open and independent board."[2] Messinger highlighted several bylaw provisions:

> * A 19-member board, representing the ethnic, economic and geographical diversity of Manhattan will, one year after the CAO begins training sessions for public access

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[2] Press Release dated May 16, 1991 is appended to this brief.

producers, include six slots reserved for active public access producers.

* The establishment of an Advisory Nominating Committee, to recommend individuals for the six public access producer slots on the Board.

* Tough prohibitions against conflicts of interest, ensuring the independence and integrity of the Board.

* In addition to its Annual Meeting the Board will hold at least two meetings each year that will be open to the public.

Borough President Messinger stressed that MNN was committed to ensuring that experienced community programming producers will participate in the governing and setting of MNN's policies through reserving six of the 18 seats on the board of directors for such community producers.

The franchise agreement required that Time Warner provide $5.35 million to MNN as initial startup capital to purchase studio space and equipment. Before the funds were disbursed, MNN was required to submit a capital expenditure plan to the Borough President and State Commission on Cable Television, detailing how it intended to spend the funds. The franchise agreement also required Time Warner to fund a community access grant program by paying MNN a fee of $3 per cable subscriber per year.

The changes in the 1990 franchise agreement were intended to ensure that Manhattan's public

access channels remain a public forum where all Manhattan residents could freely express themselves. The renewed agreement amplified the voices of public access producers by requiring significant investment in production facilities, community training in video production and editing, and most importantly, by delegating administration of the public access channels—which remain City property—to a nonprofit community access organization. These choices were informed by 20-years of neglectful administration by Manhattan's cable operators and were intended to strengthen the First Amendment protections of New Yorkers to freely express themselves on Manhattan's public access channels.

Administration of government property is a public function, and the vehicle for protecting First Amendment rights is 42 U.S.C. § 1983. Thus, MNN is a state actor and was properly sued under § 1983 in this case.

II. This Court should encourage public forums like Manhattan's public access channels because they create more speech.

When the City of New York launched the world's first experiment with public access television in the 1970 Manhattan cable franchise agreements, it intended to create a public forum, and it succeeded. Twenty years later when the City renewed the Manhattan cable franchise agreements in 1990, it intended to strengthen the First Amendment protections for the public access channels, and to expand the public

forums by creating additional public access channels. Again, it succeeded. The City of New York's decision to create a new public forum should be respected and protected by this Court, because it creates more speech. As this Court has repeatedly reaffirmed, speech on matters of public concern "occupies the highest rung on the hierarchy of First Amendment values, and is entitled to speech protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983).

Petitioner's position, by contrast, would inhibit free speech because it would limit the only First Amendment-protected public forums to the ones under strict state control. That should not be the only option.

Allowing state and local governments to partner with private entities to create and administer new public forums should be encouraged and protected by this Court because doing so creates more speech and amplifies diverse viewpoints, which is essential to the functioning of our democracy. Where the government clearly intended to create a public forum, the forum's administration by a private nonprofit corporation, instead of the government itself, should not preclude a finding that the forum is subject to constitutional protections. This is especially true, where, as here, speech on the public forum is uncensored and uninfluenced by commercial interests, and administered on a first-come, first-served basis. Under these circumstances, the intent to create a public forum could be inferred—however, as demonstrated throughout this brief, and in Respondents' brief, there is no need to infer the City's intent, as numerous City officials, cable company

executives, and MNN members have explicitly stated that the City's intent was that the public access channels would be a First Amendment-protected public forum.

This Court has "frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen v. Roe*, 429 U.S. 589, 597 (1977). This case involves just such a matter of vital local concern: New York City's courageous experiment with public access television in Manhattan. City officials, cable operators and the media all acknowledged, when Manhattan launched the nation's first public access television in 1971, that the experiment would set an example for other state and local franchising authorities nationwide.

New York City learned from its experiment. Thus, when it renewed its cable franchise agreements with Time Warner in 1990, the City significantly improved public access television in Manhattan. Most importantly, the 1990 franchise agreements removed administration of the public access channels from the cable operators themselves, and instead required that all of Manhattan's public access channels be administered by a nonprofit community access organization.

Importantly, courts have held that they should defer to state and local franchising authorities' determinations of their community's cable-related needs and interests. *See Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434 (6th Cir. 1997). In *Sturgis*, the Sixth Circuit

Court of Appeals held that the city franchising authority's "knowledge of the community give it an institutional advantage in identifying the community's cable needs and interests." 107 F.3d at 441. Particularly significant was the court's determination that the "granting of a cable franchise is a legislative act traditionally entitled to considerable deference from the judiciary." *Id.* The court found that judicial review of "a municipality's identification of its cable-related needs and interests is very limited" and that a court should defer to the franchising authority's identification of the community's needs and interests except to the extent necessary to weigh the needs and interests against the cost of implementing them. *Id.* The standard of review the court found appropriate is to view the evidence in the light most favorable to the City, giving it the "benefit of all reasonable inferences," and only reverse if "reasonable minds could not come to a conclusion" other than that reached by the City. *Id.*

This Court should defer to New York City's decision to create a public forum, administered by a private nonprofit community access organization—MNN. The administrative structure of Manhattan's current public access channels was chosen by the City after 20 years of operating the nation's first public access channels under the 1970 franchise agreements. Based on that experience, the City chose to retain some features of the original public access channels—administering time slots free of charge; on a first-come, first-served basis; prohibiting editorial control—and to change other features that inhibited their ability to achieve

the goal of functioning as the proverbial "electronic soap box." Specifically, the City found the private cable company's administration of the public access channels led them to be underfunded, underpublicized and underused. Thus, in 1990, in renewing the Manhattan cable franchises, the City delegated administration of the public access channels to a private nonprofit community access organization, chosen by the Manhattan Borough President, that was properly funded, publicized, and uninfluenced by either the cable operator or the City government.

This case demonstrates the importance, in our federal system, of our state and local governments retaining the freedom to experiment on matters of public concern. Nearly a half-century ago, New York City embarked on the freedom enhancing experiment of designating Manhattan's public access channels as public forums, and it continued that experiment in 1990 when it renewed the cable franchise agreements and delegated the administration of the public forum public access channels to a private nonprofit. Its decision deserves respect.

CONCLUSION

The Court should affirm the judgment entered below.

Respectfully submitted,

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News/ Manhattan Borough President
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MESSINGER ANNOUNCES FORMATION OF COMMUNITY ACCESS ORGANIZATION TO ADMINISTER PUBLIC ACCESS CABLE CHANNELS

Several months after Manhattan Borough President Ruth Messinger appointed a seven-member initial board of directors to administer Manhattan's four public access channels, the Borough President and the CAO's chair Gretchen Dykstra announce today that the Manhattan Community Access Organization has ratified its by-laws and has filed for incorporation.

The CAO's central charge is to administer and manage all the public access channels of the cable television systems in Manhattan – currently Paragon and Manhattan cable system – and oversee the use of facilities, equipment, supplies, services and other support made available for programming.

Prior to ratifying its by-laws, the Board met with many local public access producer groups, government officials and the Time-Warner company. "I think this small group of talented and dedicated individuals has done an extraordinary job of putting together the most extensive and thoughtful set of by-laws to govern such

an organization. From the outset, I stressed to them that I wanted an open and independent board and organization. I am very pleased to say they took my charge to heart," said the Borough President.

Highlights of the CAD's by-laws include:

* A 19-member board, representing the ethnic, economic and geographical diversity of Manhattan will, one year after the CAO begins training sessions for public access producers, include six slots reserved for active public access producers.

* The establishment of an Advisory Nominating Committee, to recommend individuals for the six public access producer slots on the Board.

* Tough prohibitions against conflicts of interest, ensuring the independence and integrity of the Board.

* In addition to its Annual Meeting the Board will hold at least two meetings each year that will be open to the public.

CAO's goals include:

* A training program that will assist and train individuals and community groups on how to use public access television. The program will include advice on how to plan and produce programming for public access channel, instruction on how to use equipment and production facilities creatively and efficiently, and how to maximize channel time.

* An extensive outreach program that will encourage newcomers and beginners to participate in the

training sessions. Likewise, outreach to experienced producers to assist in setting the organization's goals and policies.

* A charge to develop additional funding resources to expand and promote public access television.

The Manhattan CAO unlike its counterparts in the other boroughs is in a unique situation since Manhattan has a history of public access television while the others do not.

"There are very high expectations for the Manhattan CAO. There is a long history of public access television here and people have very strong opinions about how the CAO should operate. Current users and future public access producers will be very impressed with the openness of this organization," said Ms. Messinger.

Under the terms of the agreement between the City and Time-Warner, the CAO will receive a capital grant of $5.35 million to be used for facilities and equipment. At this time, that money is held in escrow by the Borough President until the State Cable Commission on Television (CCT) – which has jurisdiction over cable issues – authorizes its disbursement. The CAO is required to submit to the Borough President and the CCT a capital expenditure plan, detailing how the CAO intends to spend these capital funds.

In addition to the capital grant, Time-Warner is required to pay the CAO $3 per subscriber per year to assist in defraying operating costs. This money will

also be used to make grants to assist public access producers and support programming initiatives of the CAO.

Biographies of the Board of Directors (in alphabetical order)

Andrew Blau – Vice Chair – Project Coordinator and Research Associate, Columbia Institute for Tele-Information, Columbia Graduate School of Business. Former Assistant for Communication Policy/Advocacy for the United Church of Christ. Former Chair of the group, New York Citizen's Committee for Responsible Media. Vice-Chair of the National Federation of Local Cable Programmers and an active member of the Association of Independent Video and Filmakers Advocacy Committee.

Gretchen Dykstra – Chair – Project Director for National Video Resources, a project of the Rockefeller Foundation. Served as Director of Communications for the Charter Revision Commission. A member of the Communications Advisory Committee for the Gay Men's Health Crisis. Active with Citizens Union Foundation and Television Trust for the Environment.

Laura Handman is a Partner with the law firm of Lankenau & Bickford, representing national and local magazines, new weeklies and book publishers in the areas of libel, privacy, copyright, trademark, obscenity and other matters. Prior to that, she worked as an Assistant United States Attorney for the Eastern District of New York. Serves as a Director for the Volunteer Lawyers for the Arts.

Christopher Poussaint, Vice President of Research and Development with J.I. Sopher and Company, a real estate brokerage firm in New York City. Co-chair of Publicity and Communications for Community Board 1. Graduate of Institute for New Cinema Artists. Independent producer for cable and broadcast television and a member of the National Association of Broadcasters and the National Cable Television Association.

Ruby Rich, Director of Film and Media programs, the New York State Council on the Arts. Former film critic, Chicago Reader. Writer, Village Voice. Former Director, Film Center, School of the Arts Institute. Member of the National Advisory Board, Frameline Festival, San Francisco.

Arthur Tsuchiya is a visiting Assistant Professor with the Department of Theater at Middlebury College, Vermont. Formerly with the New York State Council on the Arts. Currently serves as Senior Consultant to Independent Television Services.

Blanca Vazquez, editor, Centro Bulletin, a journal focusing on Puerto Ricans living in the United States and Puerto Rico, published by the Center for Puerto Rican Studies at Hunter College, New York. Active with El Museo del Barrio, Institute for Puerto Rican Policy, the National Congress for Puerto Rican Rights and Media Network.

Upon her recent election as Chair of the Manhattan CAO, Gretchen Dykstra said: "Whether it's for entertainment, education or empowerment, we hope to set a new standard for opening up television in

Manhattan, so that anyone who wants, will have a voice. We all can learn from and enjoy the diversity of these opinions, ideas and dreams."

No. 17-1702

In the
Supreme Court of the United States

MANHATTAN COMMUNITY
ACCESS CORPORATION, et al.,
Petitioners,

v.

DEEDEE HALLECK, et al.,
Respondents.

On Writ of Certiorari to
the United States Court of
Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in rejecting this Court's state actor tests and instead creating a per se rule that private operators of public access channels are state actors subject to constitutional liability.

2. Whether the Second Circuit erred in holding—contrary to the Sixth and D.C. Circuits—that private entities operating public access television stations are state actors for constitutional purposes where the state has no control over the private entity's board or operations.

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INTEREST OF AMICI CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF has long defended the freedoms of speech and association, including most recently before this Court in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

PLF's interest in this case stems from its concern that the Second Circuit's decision would radically curtail private property rights and freedom of expression by imposing constitutional restraints that are intended to limit the scope of the government onto private individuals.

Founded in 2010, TechFreedom is a nonprofit, non-partisan think tank dedicated to educating policymakers, the media and the public about technology policy. TechFreedom advocates for policies that promote civil liberties, dynamism, entrepreneurship, and permissionless innovation in technology and telecommunications. TechFreedom

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

does so through publishing white papers, holding conferences and briefings, engaging with policymakers, filing briefs, amicus briefs and comments in regulatory proceedings across numerous government agencies.

At the core of TechFreedom's work is protecting the First Amendment. The Second Circuit's expansion of the "public forum" doctrine is unconstitutional and would actually reduce diversity of voices in American discourse. In an age of rapid technological change, we must not throw away the 200-year-old concept of a separation between the rights and responsibilities of private entities and government actors. The First Amendment applies only to the former and attempts to force governmental obligations on private actors will entrench incumbent companies and stifle the innovation that has resulted in such rapid and positive change in the Internet ecosystem.

INTRODUCTION AND SUMMARY OF ARGUMENT

This nation's long-standing respect for private enterprise, individual freedom, and private property ownership has led to the most dynamic engines for growth the world has ever known. When the sphere of governmental authority is small and the room for private ingenuity and liberty is expansive, there is room for human flourishing and for unparalleled achievement. Nowhere can this be seen more clearly than with the growth of technology which has transformed the way that human beings interact. Today, individuals come together to exchange ideas

and debate about everything from celebrity gossip to the foundational principles of the American Republic in spaces that are owned and operated by private parties. From television networks to Internet social media sites, these privately created venues contribute to a dynamic and robust marketplace of ideas. But individuals dissatisfied with private control of these forums seek to leverage government power to regulate them out of existence or even to take them over.

This case involves one such private forum—a television channel. While cable television networks are regulated by an extensive and burdensome web of federal, state, and city regulations, the network nevertheless retains constitutional rights regarding the content that it broadcasts on its channels. But according to the Second Circuit because a particular television channel operates for the public good and encourages the exchange of ideas like a traditional public forum its operation must be bound by the limitations of the United States Constitution and the private entity in charge of making programming decisions cannot discriminate against any content type or viewpoint. The Second Circuit's decision is so broad that under its reasoning large swathes of private property can be transformed into public property, and many private parties could be restricted and constrained as if they were state actors. If that decision is allowed to stand it will have the consequence of stifling competition and diversity in the marketplace of ideas.

The Second Circuit's decision is deeply flawed in at least four respects. First, private property does not become a public forum just because of its resemblance to public fora. Second, television networks and other private communications networks are not merely conduits of the speech of others but retain discreet First Amendment rights. Third, the use of private property for the public good does not result in the property being stripped of its private character. Finally, scarcity of channels of communication cannot justify increasingly regulating the use of private property and does not lead to the transformation of that property into a public forum. This Court must reverse the Second Circuit's decision.

ARGUMENT

I

THE SECOND CIRCUIT'S OVERBROAD RULING RISKS TRANSFORMING VAST SWATHES OF PRIVATE PROPERTY INTO PUBLIC FORA

The principle that a private corporation does not become a governmental actor merely because it has been granted permission or authority by the government is one that has deep roots in our nation's history and legal tradition. Nearly 200 years ago in the seminal case of *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 629 (1819), the Supreme Court considered whether the charter of Dartmouth College could be amended by the state of New Hampshire. New Hampshire argued that "the act of

incorporation [was] a grant of political power" that "create[d] a civil institution, to be employed in the administration of the government." *Id.* at 629. Chief Justice John Marshall rejected that argument, emphasizing that the grant or charter of incorporation does not "change[] the character of the institution, or transfers to the government any new power over it." *Id.* at 638. Even though Dartmouth College had been established in furtherance of public ends and had been given its existence by the colonial government of New Hampshire, it still retained its private character and interest. *See* Adam Winkler, *We the Corporations* 145–164 (2018) (describing the *Dartmouth College* decision and its impact on the Supreme Court's treatment of corporations). Justice Marshall's conclusion that the government's power to regulate a corporation was limited "resonated with the claims colonists made on the limits on parliamentary power during the debates over independence" and was consistent with "the rhetoric of the Revolution." Winkler at 161.

"Careful adherence" to the distinction between private and governmental entities is vital because it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). This Court has diligently maintained that distinction, *see Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State"), especially in the context of the First Amendment where "governmental action, ordinarily does not itself throw into constitutional doubt the

decisions of private citizens to permit, or to restrict, speech . . . ." *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 737 (1996).

This Court's precedent allows for two exceptions to the general principle that private actors do not become governmental actors even in the face of extensive regulatory oversight. First, there is a narrow carve-out for the "exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). This power must be one that is "traditionally associated with sovereignty, such as eminent domain." *Id.* at 353. This Court has emphasized that functions that are merely "affected with a public interest" or "clothed with a public use" do not qualify as "powers traditionally exclusively reserved to the State." *Id.* at 352. "The range of government activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions." *Evans v. Newton*, 382 U.S. 296, 300 (1966).

Second, an exception exists for "when it can be said that the State is *responsible* for the specific conduct" at question. *Blum*, 457 U.S. at 1004 (emphasis in original). The state must, in other words, "exercise[] coercive power or . . . provide[] such significant encouragement, either overt or covert, that

the choice must in law be deemed to be that of the State." "Mere approval of or acquiescence in the initiatives of a private party is not sufficient[.]" *Id.* The Court has utilized a slew of different tests for the relevant inquiry such as the "public function test," the "nexus" test, the "state compulsion" test, and the "joint action test." *Lugar*, 457 U.S. at 939. These tests each have their own idiosyncrasies, but they all boil down to the same foundational question—is the private actor in question so heavily controlled or compelled to act by a state actor that its actions must be seen as an extension of the state itself?

Under any of these existing tests—none of which were applied by the Second Circuit—the Manhattan Neighborhood Network (MNN) is likely not a state actor. As Judge Jacobs in his separate opinion concurring in part and dissenting in part explained, there is no state compulsion because the City had no direct control over MNN's editorial decision making. *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300, 310 (2d Cir. 2018) (Jacobs J., concurring in part and dissenting in part). Similarly, the two City appointed members of the MNN board did not exercise the kind of control needed to establish joint action. *Id.; cf. Wilcher v. City of Akron*, 498 F.3d 516, 522 (6th Cir. 2007) (finding that the state was liable when it had "reserved express power to review and overrule decisions . . . governing the public access channel."). The miniscule amount of control that the government has over MNN's day-to-day operations stands in stark contrast to other cases where a court determined that a private entity was a state actor. For

instance, *Evans*, 382 U.S. at 299, concerned a park which was deeded to the city, used by the city for city functions, and maintained by the city and therefore had become public property. Finally, MNN was not performing a function that was a "traditional and exclusive public function." *Halleck*, 882 F.3d at 311. As the Sixth Circuit correctly concluded in a similar case, "TV service is not a traditional service of local government" and the fact that public access channels are managed by the government in some communities does not transform the service into "a power reserved exclusively to the state." *Wilcher*, 498 F.3d at 519. That should have settled the matter; the case should be remanded to allow the Second Circuit to apply the correct tests in the first instance.

Determining state actor status requires closely "sifting facts and weighting circumstances." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). It is certainly easy to envision a public access television network that is a state actor. For instance, if a government entity runs the network, or if the government exercises direct control and supervision over the content that the network displays. Although the facts of this case do not appear to support the conclusion that MNN is a state actor, the Second Circuit could have written a narrow opinion applying the tests set forth above that would leave open the door for state actor status in a closer case.

The Second Circuit's ruling was anything but narrow. Instead, the court held that the public access channel was a public forum because of its resemblance

to traditional public fora. *See* Pet. App. 13a ("A public access channel is the electronic version of the public square."). Because MNN was required to operate the channel, this led to the conclusion that it was a state actor. Unfortunately, the Second Circuit's overbroad decision risks transforming many private actors into state actors and large swathes of property into public fora. The Second Circuit's decision lacks any meaningful limiting principle and would be disastrous for freedom of speech if allowed to stand.

Specifically, the decision below is deeply flawed in at least four respects. First, mere resemblance to government-run public fora does not create a public forum. Second, public access channels and other content providers are not merely conduits for the speech of others. Third, use of private property for the public good does not strip it of its private character. Fourth, scarcity does not justify the transformation of private property into a public forum.

A. Mere Resemblance to a Public Forum Cannot Transform Private Property

For the Second Circuit, all that was required to declare that public access channels are public fora was that the channels resemble traditional "soap box[es]" found in public streets and parks. *See Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996) (Kennedy J., concurring). But if mere similitude to a public forum creates a public forum, then a broad swath of traditionally private property will be converted into public fora. A newspaper's opinion section or online comment forum

can allow for the airing of different and competing perspectives. A shopping mall can allow competing brands to have a storefront. An online content provider such as Facebook or YouTube can allow users to create and share diverse content. Each of these fora in some ways resemble a "soap box" in a traditional public forum. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (describing the Internet as "the modern public square"). Under the reasoning of the Second Circuit, all of these can be turned into public fora.

Fortunately, that is not the law of this Court. Under this Court's long-standing doctrine, it is only "*government property* that has traditionally been available for public expression" that is subject to the full rigors of the First Amendment. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (emphasis added). The public right of access to government-owned and controlled property flows from the fact that such property has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Access to such property that has been held in the public trust is "part of the privileges, immunities, rights, and liberties of citizens." *Id.* The same cannot be said for privately held property no matter how closely it may resemble a public square.

To the contrary, the idea that private property becomes a public forum if it approximates a public forum was wisely rejected by this Court. In *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 309 (1968), *abrogated by Hudgens v. N. L. R. B.*, 424 U.S. 507 (1976), this Court engaged in an ill-fated effort to expand the scope of a public forum onto private property. When the owners of a store in a shopping mall sued to enjoin union picketers from accessing their property, this Court held that "the shopping center premises were not privately owned but instead constituted the business area of a municipality" because they were similar in nature to "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights." *Id.* at 315. A few years later, this Court wisely reversed course and emphasized that property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972). *See also Int'l Soc. For Krishna Consciousness*, 505 U.S. at 681 (emphasizing that the similarities between government and private fora was "irrelevant to *public* fora analysis").

The Second Circuit's decision is an invitation to return to the long-repudiated *Logan Valley* doctrine. This Court should reject that invitation. Transforming private property into public property would have a perverse impact on the marketplace of ideas. Such a rule would be especially burdensome to private property owners who create spaces for the expression

of a panoply of views. Social media entities in particular have staked their businesses on creating open platforms for the airing of diverse views. Under the Second Circuit's reasoning, social media platforms could face civil liability whenever they impose any kind of content restrictions, wholly upending the state of the law. *See Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 456 (E.D. Pa. 1996) (an ISP is not a state actor); *see also Green v. Am. Online, Inc.*, 318 F.3d 465, 472 (3d Cir. 2003) (same); *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (YouTube is not a public forum); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631–32 (D. Del. 2007) (a search engine is neither a state actor nor a public forum). Concretely, many websites would rather disable comment functionality entirely than have to justify comment moderation under the rigorous standards of the First Amendment.

Applying the public forum doctrine to privately created fora would paradoxically inhibit speech by encouraging the proprietor of the forum to close it entirely rather than risk First Amendment liability. *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983) (observing that a judicial attempt to make school mailboxes into public fora "would invite schools to close their mail systems to all but school personnel."). A precedent that private property can become a public forum would therefore have the result of limiting the number of private entities that risk putting themselves in a position to be designated a public forum. That is the lesson of a

close historical precedent: the FCC's Fairness Doctrine.

The Fairness Doctrine was an FCC. rule that "required broadcast media licensees (1) 'to provide coverage of vitally important controversial issues of interest in the community served by the licensees' and (2) 'to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.'" *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 655 (D.C. Cir. 1989) (quoting *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 146 (1985)). In practice, the arbiters of what constituted "contrasting viewpoints" and "reasonable opportunities" were F.C.C. bureaucrats and judges. And when either disagreed with a licensee's belief that the right voices had been presented, those licensees faced penalties of fines or even a loss of their license entirely. *See, e.g.*, *Brandywine-Main Line Radio, Inc. v. F.C.C.*, 473 F.2d 16, 63 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) ("The Federal Communications Commission has subjected Brandywine to the supreme penalty: it may no longer operate as a radio broadcast station.").

When the Fairness Doctrine was in effect, broadcasters "[came] under repeated attacks from government spokesmen who did not like the way television reported a variety of hot public issues." *Id.* at 78. The result was that individual broadcast stations felt obligated to "decrease the number of issues [they] discussed, or to decrease the intensity of [their] presentation." *Id.* at 70.

Imposing First Amendment public forum doctrine on private platforms risks a similar effect. While proponents may hope that such a rule would only "eliminate bias," individual platforms may instead impose much stricter limitations on *all* speakers, so as to reduce the risk of any one speaker claiming "viewpoint discrimination." This lesson was learned with respect to the Fairness Doctrine, an approach that was rejected by bipartisan consensus. A similar attempt at mandating "fairness" should not be imposed on private broadcasters now through judicial means. "To argue that a more effective press requires a more regulated press flies in the face of what history has taught us about the values and purposes of protecting the individual's freedom of speech." *Id.* at 79.

The risk of censorship is especially severe in the context of social media organizations. If social media entities are required to choose between allowing Nazi hate speech, videos depicting animal cruelty, or simulated virtual child porn as the First Amendment requires the government to allow[2], or engaging in an aggressive crack-down on speech, then these organizations are likely to restrict speech in order to avoid creating a public forum in the first place.

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[2] *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (Nazi march); *United States v. Stevens*, 559 U.S. 460 (2010) (snuff and crush films); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (virtual child porn).

B. Private Entities Do Not Become State Actors Merely Because They Channel Individual Speech

The Second Circuit also relied implicitly on Justice Kennedy's argument that since a government entity granted the franchise and required the creation of public access channels, the channel operators were merely "conduits for the speech of others." *Denver Area*, 518 U.S. at 793 (Kennedy J., concurring). In other words, MNN could not control the message expressed on the public access channels because the speech was not its speech at all. This reasoning is contrary to this Court's precedent which emphasizes that cable operators are no less entitled to "decide . . . the ideas and beliefs deserving of expression, consideration, and adherence" and to be free from "governmental control over the content of messages expressed by private individuals." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). Cable programming operators exercise their First Amendment rights in innumerable ways such as "through original programming or by exercising editorial discretion over which stations or programs to include in [their] repertoire." *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986); *see also Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 117 (1973) ("[A] broadcast licensee has a large measure of journalistic freedom").

Federal law imposes some limits on the ability of cable programmers to exercise editorial control over public access channels. As several members of this

Court have noted, those limits are constitutionally suspect under the unconstitutional conditions doctrine and should be "subject to some form of heightened scrutiny." *Denver Area*, 518 U.S. at 821 (Thomas J., dissenting). But regardless of the continued validity of public access requirements, federal regulations do not bestow the public with constitutional access rights "that directly conflict with the constitutionally protected private speech rights of another person or entity." *Id.* at 820. As Justice Thomas explained in *Denver Area*, "[j]ust because the Court has apparently accepted, for now, the proposition that the Constitution permits some degree of forced speech in the cable context does not mean that the beneficiaries of a Government-imposed forced speech program enjoy additional First Amendment protections beyond those normally afforded to purely private speakers." *Id.* at 822. *See also Information Providers' Coalition for Defense of First Amendment v. F.C.C.*, 928 F.2d 866, 877 (9th Cir. 1991) ("[A] carrier is free under the Constitution to terminate service to dial-a-porn operators altogether").

Moreover, contrary to the Second Circuit's determination that public access providers are mere "conduits," public access providers can and do "exercise[] editorial discretion" as permitted by the First Amendment outside of federally imposed limits. For instance, one of the channels that MNN offers to the public is a partnership with Free Speech TV, a news network that offers a "progressive perspective on the news" and offers such left-leaning programing as Democracy Now! and Gay USA. *See* Free Speech TV,

Manhattan News Network Partners with Free Speech TV (Dec. 21, 2016)[3]. The result of this partnership is a richer diversity of programing. Taking the Second Circuit's reasoning to its logical conclusion, public access channels such as MNN would be unable to take steps to curate content or structure programming in furtherance of their mission to serve the public, let alone engage in similar partnerships such as that between MNN and Free Speech TV. A government actor required to carry public speech on equal terms could not host a network that treated progressive viewpoints more favorably than conservative viewpoints. Treating MNN as a state actor would therefore stifle diversity, harm the marketplace of ideas, and disserve the public. And this same logic could apply to any entity that could be described as "conduits for the speech of others," such as social media platforms. The Second Circuit's misguided decision would therefore wreak havoc on the ability of speech platforms to exercise editorial discretion or control.

Unfortunately, this Court's decision in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) contributed to the Second Circuit's confusion. In that case, the Court reiterated its determination that the First Amendment did not require property owners to relinquish private property rights, but suggested that the First Amendment did not prevent a state from forcing a large shopping mall to operate as a public forum when the property was open to the

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[3] https://freespeech.org/press-releases/mnn-welcomes-free-speech-tv/.

public and private speech was unlikely to be attributed to the owner. *PruneYard* was wrong when it was decided, and has grown ever more dubious in light of this Court's increasing scrutiny of laws that compel speech. *See Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018) (forced subsidy of union speech violates the free speech rights of nonmembers); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (law requiring crisis pregnancy centers to notify patients of the availability of publicly funded abortion was compelled speech and violated the First Amendment); *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (compelled assessment for mushroom promotion violated the First Amendment). The Court should therefore take this opportunity to repudiate the *PruneYard* doctrine and clarify that private property owners cannot be compelled by government fiat to allow their property to be used as a public forum. In any event, this case is distinguishable from *PruneYard* in that MNN exercised its editorial discretion to bar speech specifically because it objected to the content. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 580 (1995) (explaining that *PruneYard* "did not involve any concern that access to this area might affect the shopping center owner's exercise of his own right to speak" and that the owner in *PruneYard* "did not even allege that he objected to the content of the pamphlets") (internal citations omitted). If this Court does not wholly repudiate *PruneYard*, it should clarify that *PruneYard* is limited to cases where the content

of the speech in question is not contrary to the owner's right of self-expression.

C. The Fact That Public Access Channels Serve the Public Good Rather Than Generate Profit Should Not Turn Them into Public Fora

More than 20 years ago, the Second Circuit correctly concluded that a provider of leased access channels was not a state actor. *Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256 (2d Cir. 1999). In reaching the opposite conclusion in this case, the Second Circuit honed in on the distinction between nonprofit uses of property, which it saw as akin to government action, and for-profit uses, which are akin to private commerce. But this distinction is arbitrary and meaningless with regard to the reach of the First Amendment. In both instances cable operators are required to offer channels to the public that might have been used for another purpose and are subject to the same degree of government oversight. Nor is the presence or absence of a profit motive constitutionally significant. For-profit companies are "not require[d] . . . to pursue profit at the expense of everything else, and many do not do so." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014). For-profit organizations "support a wide variety of charitable causes . . . to further humanitarian and other altruistic objectives." *Id.* Owners of a for-profit are not required to sacrifice constitutional rights such as the right to freedom of speech and private property if they choose to pursue

the public good. Similarly, a private property owner can open his property for both paid and unpaid uses without relinquishing private property rights. *See Soderholm v. Chicago Nat. League Ball Club, Inc.*, 587 N.E.2d 517, 520 (Ill. App. 1992) (holding that "mere permission to use land does not ripen into a prescriptive right regardless of the length of time that such enjoyment is permitted"). For instance, the owner of a concert venue might allow artists to perform there for a fee, but also allow a charitable benefit concert to use the space without cost. This Court should clarify that the nonprofit use of property, such as providing public access channels, does not transform the property into a public forum.

D. Scarcity Cannot Justify the Transformation of Private Property into a Public Forum

An alternative rationale for the Second Circuit's ruling is the claim that public access networks are a limited resource and that therefore scarcity requires opening up these fora to the public. This Court has at times embraced the argument that scarcity can justify government regulations that guarantee public access. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). And in limited contexts, such as with a true government-granted monopoly, scarcity might justify greater government intervention. But there are several significant problems with that argument in this case.

First, the scarcity rationale in *Red Lion* was "dubious from [it]s infancy," *Denver Area*, 518 U.S. at 813 (Thomas J., dissenting); *see also Columbia Broad.*

Sys., Inc. v. Democratic Nat. Comm., 412 U.S. 94, 155 (1973) (Douglas J., concurring) (arguing that scarcity or the desire for a balanced perspective "was no reason to put the saddle of the federal bureaucracy on the backs of publishers"), is inapplicable to cable television, *Turner*, 512 U.S. at 622, and has become obsolete in light of other technological developments. This Court denied cable operators full protection of the First Amendment in *Turner*, only because of the "special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators . . . ." 512 U.S. at 661. This supposed "gatekeeper" power over the content viewed by Americans depended on two factors: First, cable providers controlled very nearly 100% of the market for Multichannel Video Programming Distribution in data then available to the Court. This monopoly power disappeared almost immediately with the rise of satellite television. According to the most recent data from the Federal Communications Commission, at the end of 2015, cable operators had just 53.1% of the MVPD market and 99% of Americans had access to three television providers (satellite or cable). Federal Communications Commission, 18th Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, ¶¶ 2, 21 & Table III.A.2. These statistics dramatically *overstate* the continuing power of cable operators, both because they are now three years old, and cable's market share has declined steadily for years, and also because the percentage of Americans subscribing to *any* television service has also declined. Many Americans have simply "cut the cord" to television

services entirely. In the fall of 2018 alone, more than one million cable and satellite TV subscribers cancelled their subscriptions, largely because of the greater availability of online options. *See* Mike Snider, *Cord cutting accelerates as pay TV loses 1 million customers in largest-ever quarterly loss*, USA Today (Nov. 7, 2018)[4].

The second factor critical to *Turner* has also disappeared: "When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home." *Turner*, 512 U.S. at 656. But today, even those who do subscribe to cable (or satellite) service, can easily access video content online just as easily. For instance, the video at the heart of this litigation can be accessed by any member of the public on YouTube[5]. And Comcast, the nation's largest cable company, allows its subscribers to access YouTube content through an app presented alongside its own content in the Xfinity user interface. *See* Comcast, YouTube App on Xfinity X1 Overview[6]. There is simply no longer the need to treat cable (or

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[4] https://www.usatoday.com/story/tech/talkingtech/2018/11/07/cord-cutting-accelerates-1-m-customers-dropped-pay-tv-last-quarter/1919471002/

[5] The 1% Visits El Barrio; Whose Community?, YouTube (July 29, 2012) https://www.youtube.com/watch?v=QEbMTGEQ1xc.

[6] https://www.xfinity.com/support/articles/x1-youtube-app-overview (last visited Dec. 5, 2018).

broadcast) television as a scarce resource that justifies government intervention and oversight.

Finally, the Second Circuit's decision goes far further than the Supreme Court did in *Red Lion*. There, the Court found that federal regulations requiring community access did not violate the First Amendment. Here, the Second Circuit found that such public access requirements were constitutionally *required* by virtue of the nature of the forum. The implications of that extension of *Red Lion* are stark; any owner of a scarce resource can now be conscripted into government service even without any express federal action, and even when the government ownership conflicts with the owner's First Amendment rights. *See Denver Area*, 518 U.S. at 820 (Thomas J., dissenting) ("[T]he Court has not recognized, as entitled to full constitutional protection, statutorily created speech rights that directly conflict with the constitutionally protected private speech rights of another person or entity."). This Court must reject the Second Circuit's faulty decision.

CONCLUSION

This Court should reverse the Second Circuit and find that MNN is not a state actor.

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Respectfully submitted,

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